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REPORTS

OF CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Tennessee

FOR THE

EASTERN DIVISION,

September Term, 1892;

FOR THE

MIDDLE DIVISION,

December Term, 1892;

AND FOR THE

WESTERN DIVISION,

April Term, 1893.

GEORGE W. PICKLE,
ATTORNEY-GENERAL AND REPORTER.

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Green <i>v.</i> Williams	92 Tenn., 220	548
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Guest, Columbia <i>v.</i>	2 Head, 414	369
Guild, McCombs <i>v.</i>	9 Lea, 81	126
Gurley, Railroad <i>v.</i>	12 Lea, 59	33
Guthrie <i>v.</i> Railroad	11 Lea, 372	207

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Hackett <i>v.</i> Brown	2 Head, 262	723
Hackney <i>v.</i> Hackney	9 Hum., 453	40
Hagerty, Bank <i>v.</i>	88 Tenn., 705	252
Hagler, Bomar <i>v.</i>	7 Lea, 89	230
Hale, Railroad <i>v.</i>	6 Heis., 271	326
Handman, Railroad <i>v.</i>	13 Lea, 423	385
Hardeman <i>v.</i> Burge	10 Yer., 202	537
Harding <i>v.</i> Waters	6 Lea, 331, 333	6, 537
Harrison, Pope <i>v.</i>	16 Lea, 92	127
Harvey, Marble Co. <i>v.</i>	92 Tenn., 115	168
Hawkins <i>v.</i> Pearce	11 Hum., 44	673
Haworth <i>v.</i> Montgomery	91 Tenn., 16	587
Haynes <i>v.</i> Jones	2 Head, 373	574
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Heiskell <i>v.</i> Chickasaw Lodge	87 Tenn., 668	115, 559
Henderson <i>v.</i> Hill	9 Lea, 25	348
Henderson <i>v.</i> Overton	2 Yer., 396	348
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Henderson <i>v.</i> Tipton	88 Tenn., 255	230
Hendricks, Railroad <i>v.</i>	88 Tenn., 718	614

Henry <i>v.</i> Mills	1 Lea, 144	230
Hickman, Lewis <i>v.</i>	2 Overton, 316	230
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Hicks, Shelby <i>v.</i>	5 Sneed, 197	220, 548, 660
Hill, Henderson <i>v.</i>	9 Lea, 25	348
Hill <i>v.</i> Walker	6 Cold., 429	537
Hoggat <i>v.</i> McCrory	1 Tenn., 9	495
Holland <i>v.</i> Railroad	16 Lea, 418	673
Holman, Mason <i>v.</i>	10 Lea, 315	573
Holmes <i>v.</i> Eason	8 Lea, 754	126
Holmes, Sayre <i>v.</i>	2 Cold., 263	465
Holt, Lisenbee <i>v.</i>	1 Sneed, 50	673
Hornberger <i>v.</i> Hornberger	12 Heis., 635	189
Horton <i>v.</i> Nashville	4 Lea, 49	335
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Hughlett, Bickerstaff <i>v.</i>	2 Tenn., 270	495
Hume <i>v.</i> Knoxville	1 Hum., 403	335
Hunt, Rice <i>v.</i>	7 Lea, 33	673
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Insurance Co., Smith <i>v.</i>	2 Tenn. Ch., 602	537
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J.

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Johnson <i>v.</i> Patterson	13 Lea, 626	573
Johnson, Railroad <i>v.</i>	16 Lea, 387	471
Johnson <i>v.</i> State	11 Lea, 49	87
Jones, Haynes <i>v.</i>	2 Head, 373	574

Jones <i>v.</i> Pearce	12 Heis., 286	483
Jones <i>v.</i> State	5 Sneed, 346	537
Jones <i>v.</i> Ward	10 Yer., 168	460
Jordan, Knight <i>v.</i>	6 Hum., 101	482

K.

Kay <i>v.</i> Smith	10 Heis., 43	305
Kearns, Reams <i>v.</i>	5 Cold., 217	126
Keathy, Shirley <i>v.</i>	4 Cold., 292	723
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Mann <i>v.</i> State	3 Head, 373	87
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Marble Co. <i>v.</i> Black	89 Tenn., 118	537
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McNabb, Weller <i>v.</i>	4 Sneed, 422	220
McRoberts <i>v.</i> Copeland	85 Tenn., 211	707
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Meek, Jackson <i>v.</i>	87 Tenn., 73	598
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Moore <i>v.</i> Walker	3 Lea, 665	482
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Morgan <i>v.</i> Pope	7 Cold., 547	559
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Overton, Henderson <i>v.</i>	2 Yer., 396	348
Owen <i>v.</i> State	5 Sneed, 493	537

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Panesi <i>v.</i> Boswell	12 Heis., 323	483
Parker, State <i>v.</i>	8 Bax., 498	460
Patterson, Johnson <i>v.</i>	13 Lea, 626	573
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Pearce, Jones <i>v.</i>	12 Heis., 286	483
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Pearce, Smith <i>v.</i>	2 Swan, 128	514
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Phillips <i>v.</i> Robertson	2 Tenn., 399	495
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Pierce <i>v.</i> Bowers	8 Bax., 353	126
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Pope <i>v.</i> Harrison	16 Lea, 92	127
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Porter, Kerr <i>v.</i>	1 Tenn., 353	495
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Railroad <i>v.</i> Collins	85 Tenn., 227	207
Railroad <i>v.</i> Crider	91 Tenn., 489	108
Railroad <i>v.</i> Duffield	12 Lea, 63	208
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Railroad, Guthrie <i>v.</i>	11 Lea, 372	207
Railroad <i>v.</i> Hale	85 Tenn., 69	326
Railroad <i>v.</i> Handman	13 Lea, 423	385
Railroad <i>v.</i> Hendricks	88 Tenn., 718	614
Railroad, Holland <i>v.</i>	16 Lea, 418	673
Railroad <i>v.</i> Jackson	6 Heis., 271	326
Railroad <i>v.</i> Johnson	16 Lea, 387	471
Railroad <i>v.</i> Kennedy	90 Tenn., 185	673
Railroad <i>v.</i> Lahr	86 Tenn., 340	385
Railroad <i>v.</i> Lilly	90 Tenn., 563	142
Railroad <i>v.</i> Mason	11 Lea, 116	326
Railroad, Patton <i>v.</i>	89 Tenn., 370	27
Railroad <i>v.</i> Pitt	91 Tenn., 86	142
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Robertson, Phillips <i>v.</i>	2 Tenn., 399	495
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Rosson <i>v.</i> Carroll	90 Tenn., 90	537
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Searight <i>v.</i> Payne	6 Lea, 283	599
Sellars, Barnes <i>v.</i>	2 Sneed, 33	495
Shelby <i>v.</i> Hicks	5 Sneed, 197	220, 548, 660
Shelton, Jackson <i>v.</i>	89 Tenn., 82	707
Shirley <i>v.</i> Keathy	4 Cold., 92	723
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Smith, Nashville <i>v.</i>	86 Tenn., 213	188
Smith <i>v.</i> Nashville	88 Tenn., 467	188
Smith <i>v.</i> Pearce	2 Swan, 128	514

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Smith <i>v.</i> State	1 Yer., 228	634
Smith, State <i>v.</i>	16 Lea, 665	559
Smith <i>v.</i> Taylor	11 Lea, 738	348
Smitha <i>v.</i> Railroad	86 Tenn., 198	326
Sneed <i>v.</i> Jenkins	90 Tenn., 137	715
Sommers <i>v.</i> Railroad	7 Lea, 201	27
Spence <i>v.</i> State	15 Lea, 547	87
Springer <i>v.</i> Smith	3 Lea, 737	348
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State <i>v.</i> Crutchfield	2 Swan, 512	230
State, Draper <i>v.</i>	1 Head, 262	520
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State <i>v.</i> Glenn	7 Heis., 472	62
State, Johnson <i>v.</i>	11 Lea, 49	87
State, Jones <i>v.</i>	5 Sneed, 346	537
State, Kurth <i>v.</i>	86 Tenn., 136	369
State <i>v.</i> Leonard	86 Tenn., 485	62
State, Lewis <i>v.</i>	3 Head, 149	476
State, Mann <i>v.</i>	3 Head, 373	87
State <i>v.</i> McKee	8 Lea, 24	62
State, McTigue <i>v.</i>	4 Bax., 314	86
State, Moore <i>v.</i>	5 Sneed, 512	85
State, Neil <i>v.</i>	2 Lea, 675	126
State, Owen <i>v.</i>	5 Sneed, 493	537
State <i>v.</i> Parker	8 Bax., 498	460
State <i>v.</i> Phoenix Insurance Co. . .	92 Tenn., 420	587
State, Poe <i>v.</i>	85 Tenn., 495	607
State, Rader <i>v.</i>	5 Lea, 613	87
State, Ransome <i>v.</i>	91 Tenn., 716	275, 320
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Stephens <i>v.</i> Bomar	9 Hum., 546	482
Stephens <i>v.</i> Railroad	10 Lea, 448	26, 142
Stephenson <i>v.</i> Ewing	87 Tenn., 46	587
Stephenson <i>v.</i> Yandle	3 Hay., 109	293
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Templeton <i>v.</i> Twitty	88 Tenn., 595	482
Terrell <i>v.</i> State	86 Tenn., 523	607
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Thomas, Rivers <i>v.</i>	1 Lea, 649	6, 537
Thompson, Barnes <i>v.</i>	2 Swan, 312	660
Thornburg, McCampbell <i>v.</i>	3 Head, 309	723
Tillery, Simmons <i>v.</i>	1 Tenn., 275	348
Tipton, Henderson <i>v.</i>	88 Tenn., 255	230
Tipton <i>v.</i> Miller	3 Yer., 423	495
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Turner <i>v.</i> Fisher	4 Sneed, 209	673
Turner <i>v.</i> State	89 Tenn., 559	86
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Walden, Berry <i>v.</i>	4 Hay., 179	348
Walker, Hill <i>v.</i>	6 Cold., 429	537
Walker, Moore <i>v.</i>	3 Lea, 665	482
Walker, West <i>v.</i>	2 Swan, 32	723
Wallace <i>v.</i> Bank	89 Tenn., 643	310
Walton, Williams <i>v.</i>	8 Yer., 391	482
Ward, Carter <i>v.</i>	2 Tenn., 340	495
Ward, Jones <i>v.</i>	10 Yer., 168	460
Waters, Harding <i>v.</i>	6 Lea, 331	6, 537
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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1892.

KNOX COUNTY *v.* KENNEDY.

(*Knoxville.* October 15, 1892.)

COUNTIES. *Powers of, in construction of turnpikes.*

Counties are authorized to construct turnpikes, and may, by proper proceedings, condemn land for that purpose.

Code construed: §§ 1549, 1550 (M. & V.); §§ 1325, 1326 (T. & S.).

Acts construed: Acts 1883, Ch. 167; Acts 1881, Ch. 118.

FROM KNOX.

Appeal in error from Circuit Court of Knox
County. S. T. LOGAN, J.

Knox County v. Kennedy.

WALTER M. COCKE, LINK HOUK, and WASHBURN,
TEMPLETON, PICKLE & TURNER for Knox County.

WEBB & McCLOUD and WILLIAMS, HENDERSON &
DAVIS for Kennedy.

SNODGRASS, J. This is a proceeding by the county of Knox in the Circuit Court to condemn land for a turnpike, under § 1326 of the Code. The company claims power to appropriate land to this purpose because it is a corporation and within the meaning of the preceding section (§ 1325).

The language of that section is as follows:

"Any person or corporation *authorized by law* to construct any railroad, turnpike, canal, toll-bridge, road, causeway, or other work of internal improvement to which the like privilege is conceded, may take the real estate of individuals, not exceeding the amount prescribed by law or by the charter under which the person or corporation acts, in the manner and upon the terms herein provided."

It will be observed that this statute only vested authority to take real estate for such purpose in persons or corporations already "*authorized by law*" to construct a turnpike. As the counties of the State had then no such power, it is clear that the Act never included them, not because they might not have fallen within the meaning of the term "corporations," but because they were not "corporations authorized by law to construct turnpikes."

The question is, Have they been brought within the Act by subsequent legislation? By the Act of

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1881 County Courts were authorized to own and manage turnpike roads. Page 150. This ownership was limited to roads conveyed by chartered turnpike companies. It did not authorize the construction of a turnpike by a county. But in 1883 an Act was passed for this especial purpose. It is Chapter 167 of Acts of that session, page 216, and entitled "An Act to provide for the *construction, repairing, and buying of turnpike, macadamized, and graded gravel roads.*"

The first section of this Act provides for the election of Turnpike Commissioners; the second for levy of a tax for turnpike purposes. This section, in general terms, directs that "all taxes collected under this Act shall be applied by said Commissioners to the *construction, repairing, or buying of turnpike, macadamized, or graded gravel roads in the county from which the tax is collected.*

Succeeding sections, down to No. 7, are devoted to detail of proceedings for collection of tax by Trustee, oath of office, bond, record to be kept, organization and salaries of Commissioners, and are unimportant to quote. The seventh is as follows:

"That said Commissioners shall expend the amount of this fund received from the Trustee in constructing, repairing, or buying turnpike, macadamized, or graded gravel roads, first on such roads as in their judgment are the most important or most traveled highways throughout the

KNOXVILLE:

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county, or at such places on said highways as may be most conducive to the public good."

The second section had directed, in general terms, the application of the fund to "*construction, repairing,*" etc. Here it was provided that such application should be made *first* "on such roads as in the judgment of the Turnpike Commissioners are the most important or most traveled highways throughout the county, or at such places on said highways as may be most conducive to the public good."

From this it is argued that the power of the county, acting through its Turnpike Commissioners, was limited to constructing of turnpike beds or roads already laid out in the county; and such was defendant's position below, embodied in its demurrer to the petition to condemn, on which demurrer the petition was dismissed.

This is an erroneous view of the law. The Act is to authorize the "*construction,*" and the general direction of application of fund is also for "*construction of turnpikes.*" The language of the section bears, properly, no such construction as contended. In reference to construction, its meaning is that the funds expended by Commissioners in constructing turnpikes shall be first on construction of such roads as, in their judgment, are most important, and not that the funds shall be expended first in constructing a bed on existing roads of most importance, or on most traveled highways.

Knox County *v.* Kennedy.

But if this were not the proper construction of Section 7, and defendant was right in assuming that this section required the Commissioners to apply the turnpike money *first* to the making of turnpike beds on existing roads, it would not affect the general power of the county, through the Commissioners, to apply tax to general construction of turnpikes under Section 2 of the Act already quoted. The seventh section could but be a direction, to control their discretion as to where the fund should be *first* applied.

It would not alter the fact that the power to construct was included in the second section, and that is the point of this inquiry. If the county is now authorized "to construct a turnpike," it has been brought within the terms of § 1325, and this proceeding is proper. Of course, the section quoted, being a general and continuing law, it included corporations then, or at any time following, within its provisions.

That the counties were authorized to construct turnpikes under the Act of 1883 has been the legislative view of the question since its passage, and the last road Act specially reserved to the County Courts, the power to "build turnpikes," by providing that nothing in the Act should be construed to impair that power. Acts 1891, Sec. 44, p. 16.

The judgment of the Circuit Court dismissing the petition is erroneous, and is reversed, with cost, and the case remanded for further proceedings.

KNOXVILLE:

Morrison Lumber Co. v. Lookout Mountain Hotel Co.

MORRISON LUMBER Co. v. LOOKOUT MOUNTAIN HOTEL Co.

(*Knoxville. October 15, 1893.*)

1. NEGOTIABLE INSTRUMENTS. *Indorsers' liability inter sese.*

The payee of a negotiable note, whose name stands as first indorser thereon, cannot recover of parties whose names stand as subsequent indorsers thereon, the amount paid by him in satisfaction of the note, without averment and proof of facts showing that the subsequent indorsers are, as to him, in fact joint makers or guarantors of the note. Both averment and proof are wanting in this case.

2. SAME. *Same. Parol evidence.*

Prima facie a second indorser is not liable to a payee who appears on the paper as first indorser, but, as between the parties themselves, the Courts will inquire into and declare the true order of liability; and upon this question parol evidence is admissible.

Cases cited and approved: Rivers v. Thomas, 1 Lea, 649; Harding v. Waters, 6 Lea, 331.

Cited as overruled: Comparree v. Brockway, 11 Hum., 355; Clouston v. Barbiere, 4 Sneed, 335; Brinkley v. Boyd, 9 Heis., 150; 95 U. S. 90; 22 How., 341.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.
T. M. McCONNELL, Ch.

COOKE, FRAZIER & SWANEY for Lumber Company.

WATKINS & BOGLE for Hotel Company.

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LURTON, J. The Lookout Mountain Hotel Company executed to the Morrison Lumber Company a note, in words and figures as follows:

"\$524.25. CHATTANOOGA, TENN., Nov. 12, 1890.

"Ninety days after date we jointly and severally promise to pay to the order of Morrison Lumber Company, of Chattanooga, five hundred and twenty-four $\frac{25}{100}$ dollars, at First National Bank, Chattanooga, Tenn. Value received.

"If suit is brought upon this note, we agree to pay five per cent. attorney's fees, and costs of collection.

"(Signed) LOOKOUT MOUNTAIN HOTEL Co.,

"By H. WHITESIDE, Pres't.

(Indorsed on back:)

"MORRISON LUMBER Co., R. MORRISON, Pres't.

"E. ATKINS.

"H. WHITESIDE."

Upon the face of this note, the defendants, Watkins and Whiteside, are but second indorsers, and the complainant is the payee and first indorser. *Prima facie*, a second indorser is not liable to a payee, who appears on the paper as first indorser. To enable such a payee to recover against defendants—appearing to be only subsequent indorsers—there should be some averment of facts sufficient in law to constitute them either joint makers or guarantors. Randolph, Com. Paper, Sec. 844.

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The bill is defective in this particular. It does not allege that appellees were joint makers or guarantors; nor does it state any fact from which this relation could be presumed. The only allegation is that defendants—which includes the maker—are indebted by note, and that demand, protest, and notice had been regularly made. The answer is equally vague. It asseverates, with vigor, that the *note* shows that Whiteside and Watkins are second indorsers, and that the complainant is payee and first indorser. This was a state of facts apparent on inspection. Whether they became indorsers at the request of the maker, and before delivery to the payee, or at the request of the payee, after delivery, cannot be discovered from the pleadings.

From the evidence of Mr. Morrison, the only witness who speaks at all as to the circumstances under which these indorsements were made, it appears that the note sued on is a second renewal note. The first note was signed by the Lookout Hotel Company alone, and was given in settlement of an account for lumber. This original note was indorsed by the payee, and discounted in the First National Bank of Chattanooga. When it fell due it was not paid, but renewed by substituting another note, executed by same maker, and indorsed by the present defendants, Watkins and Whiteside. This renewal note was not paid, the personal note being executed and placed with the discounting bank in lieu of the past-due note.

Morrison Lumber Co. v. Lockout Mountain Hotel Co.

Under the earlier cases in this State, there was no liability by such indorsers to the payee, who must necessarily become the first indorser. These cases were practically overruled by *Rivers v. Thomas*, 1 Lea, 649; and in the latest utterance of this Court the cases of *Comparree v. Brockway*, 11 Hum., 355; *Clouston v. Barbiere*, 4 Sneed, 335; and *Brinkley v. Boyd*, 9 Heis., 150, were expressly overruled. *Harding v. Waters*, 6 Lea, 331.

The rule in this State, as now settled, in regard to irregular indorsements is that, as between the parties to such paper, parol evidence may be received to show the circumstances under which such indorsement was made; and from all the facts and circumstances surrounding the indorsement, the Court will give to such contract that interpretation and effect which will carry out the just intent and understanding of the parties. In the absence of any evidence as to the circumstances, the contract must rest upon the presumption arising as matter of law from the attitude of the names upon the paper. *Harding v. Waters*, *supra*; *Good v. Martin*, 95 U. S., 90; *Rey v. Simpson*, 22 How., 341.

The facts and circumstances shown in evidence in this case are aggravatingly meager. The only witness who undertakes to speak upon this question at all omits much that would have thrown light upon the intent and understanding as to these indorsements. This much is clear: The payee in the original note had indorsed it to the dis-

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counting bank. The maker had permitted it to go to protest. The payee was liable to the bank on its indorsement. Under these circumstances a new note is made by the debtor. The indorsement of defendants, Whiteside and Watkins, was procured, and the note discounted in bank to take up the original past-due note. This second note matured, and, like the first, is protested for non-payment. A third note is made by the debtor company. The indorsement of Whiteside and Watkins again procured. This note is discounted in bank, after being indorsed by the payee, and with its proceeds the former renewal note taken up.

Now, were these indorsements upon either of these renewal notes made on request of the maker? If so, upon what consideration? If made before delivery to the payee, and upon request of the maker, the presumption would be that the purpose was to give credit to the maker, and thus enable him to obtain an extension of time.

The extension of time would be a good consideration, and take the case without the statute of frauds. *Rivers v. Thomas, supra.* Under such circumstances the intent of the indorsers to aid the credit of the maker, upon a good consideration, would make them liable as guarantors to the payee or any other to whom the note might come. To give effect to the clear intent of such indorsers, the law would give to the contract such interpretation as would give effect and validity to an otherwise ineffectual engagement.

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The facts in this record are not such as imply an intent to give credit to the maker, or to become liable to the payee. When Mr. Morrison, the president of the payee company, was asked as to whether this note was indorsed by Whiteside and Watkins before delivery to his company, he answered that "the note was indorsed by Whiteside and Watkins before it was indorsed by the Morrison Lumber Company." Speaking further of the first renewal note, but calling it improperly the original note, the same witness said: "The original note was indorsed by Whiteside and Watkins, and when it became due was not paid, and this note [referring to the one in suit] is a renewal note. *I took it to Whiteside and Watkins, and they indorsed it, and I afterwards indorsed it for the Morrison Lumber Company, at the time I took it to the bank.*"

Now, if the hotel company, after maturity of its unindorsed original note, gave a new note to its creditor, and the creditor, for the purpose of enabling it to discount such note and pay off the past-due note upon which it was liable as indorser to the discounting bank, procured the indorsements of Whiteside and Watkins after it had accepted such an unindorsed note from its debtor, and such indorsement was not in pursuance of any agreement between the maker and the indorsers for the benefit of the maker, then it is clear that such indorsers would not be liable to the payee for whose benefit they indorsed, either as joint makers or guarantors.

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The circumstances of this case tend to indicate that these indorsements were procured by the payee after the delivery of the renewal note to it. They tend to show that the indorsement was made to enable the payee to discount the note and take up the past-due renewal note, on which it was liable as indorser. We do not overlook the fact that H. Whiteside, one of these indorsers, is probably the same H. Whiteside who, as president of the hotel company, had executed this note for the hotel company. Yet it is not improbable that *after* he had made and delivered this renewal note to the complainant company, that he was solicited by the payee to indorse it individually to enable the payee to discount it; for, as before stated, the president of the creditor corporation states that "he took the renewal note to Whiteside and Watkins, and they indorsed it." That they did so at his request and for his benefit is most probable, from all the circumstances stated.

When a note is indorsed by a third person, after its delivery to the payee, and at the request of the payee, and for the purpose of enabling him to discount it, such an indorser cannot be held liable to the payee, either as a joint maker or guarantor, but is only liable to the assignee of such note as an indorser after protest and notice.

The decree dismissing the bill as to the defendants, Watkins and Whiteside, must be affirmed.

Chamberlain v. Fox Coal and Coke Co.

CHAMBERLAIN v. FOX COAL AND COKE CO.

(Knoxville. October 17, 1892.)

1. ATTORNEY. *Competent witness to prove client's declarations, when.*

The vendor's attorney is a competent witness on behalf of his client to prove the representations made by the latter pending negotiations for the sale of land, in a suit brought by the vendee for rescission of the contract of sale for alleged fraudulent misrepresentations of the vendor.

2. RESCISSION. *Not granted for misrepresentation, when. Example.*

Rescission of contract for sale of land will not be granted upon the vendee's application for alleged misrepresentations of the vendor as to the character, capacity, or quality of the property sold, unless it clearly appears that the misrepresentation was concerning a material matter, and operated as a material inducement to the purchase. The vendor's representation, as to the daily output of the coal-mine involved in this cause, is not material under the facts of this case.

3. SAME. *Not granted for vendor's failure to disclose pending suit, when.*

Rescission of contract for sale of land will not be granted upon the vendee's application, because of the vendor's failure to disclose the existence of a pending suit for the possession of the land, where the vendor's possession could not have been lawfully disturbed, in any event, by the result of that suit—it being, as regards the vendor *res inter alios acta*.

4. SAME. *Same.*

And the result is the same, as regards rescission, even if the vendee is subsequently evicted by the unlawful execution of the writ of possession in that suit.

5. FORCIBLE ENTRY AND DETAINER. *Effect of recovery against employe of possessor.*

The party in peaceable possession of real estate cannot be lawfully dispossessed by writ issued under judgment in forcible entry and detainer suit brought against a few of his numerous employes engaged as

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common laborers, but not residing, on the premises. Neither can his employes of the same or a higher grade, who are not sued, be dispossessed by such writ.

Cases cited: Davidson *v.* Phillips, 9 Yer., 95; Elliott *v.* Lawless, 6 Heis., 125.

6. RES ADJUDICATA. *Does not exist, when.*

And judgment against the employe in such suit is not binding upon the employer, although the latter knew of the existence of the suit, and assisted the employes in its defense by employment of counsel and otherwise.

Case cited and approved: Boles *v.* Smith, 5 Sneed, 105.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.
T. M. McCONNELL, Ch.

COOKE, FRAZIER & SWANEY and M. H. CLIFT for
Chamberlain.

Pritchard, Sizer & Thomas for Company.

LURTON, J. The complainant seeks a rescission of a contract of sale of a leasehold estate in a tract of 5,700 acres, upon which is situated a valuable coal-mine. The conveyance also embraced certain movables, such as miners' houses, coal-cars, rail and tramways, screens, scales, mining tools, and also certain rights of way over adjacent lands. The conveyance was made by the Fox Coal and Coke Company, a Tennessee corporation, which

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was the assignee of a lease, originally made in 1885 to other parties, for a term of ninety-nine years. The consideration expressed in the deed is \$57,500, and the assumption by the vendee of the rents, payable to the original lessors and owners of the fee; and upon the further consideration that the vendee should expend, within one year, the sum of ten thousand dollars in permanent improvement of the mines. Twenty-five hundred dollars was paid in cash, and for the remainder notes were executed, maturing at different dates.

Upon the pleadings and proof, the Chancellor, upon final hearing, dismissed the bill. The complainant has assigned as error the action of the Chancellor in not finding, upon the evidence, that a fraud was practiced upon complainant, by misrepresentations made to induce the sale, concerning the daily output of the mines while being operated by the vendor. We do not think the Chancellor erred in this respect. Complainant and one Hood do testify that Mr. Line, the secretary of the defendant company, did represent that the output had averaged between two hundred and two hundred and fifty tons per day. Mr. Line very positively denies the statement. He is confirmed, as to what passed between himself and Mr. Chamberlin at the time the sale was consummated, by the evidence of Mr. Pritchard, who was present during the negotiations as counsel for the Fox Coal and Coke Company. Whatever question may be made upon the competency of the evidence of

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Mr. Pritchard as to subsequent transactions about which he testifies, there can be no doubt but that, at the time these negotiations for the sale were pending, Mr. Pritchard represented the vendor alone, and was competent, when called by his client, to say what representations had or had not been made. The representations to the witness, Hood, are laid at a different time and place.

Assuming both Mr. Hood and Mr. Line to be equally credible witnesses, complainant's case, on this point, must fail, because not supported by the weight of proof. To strengthen this view, there is the added circumstance that complainant had sent two competent persons to examine the property, and this fact, taken with the positive testimony of both Mr. Line and Mr. Pritchard, indicates that complainant was fully advised as to the character and prospects of this property by his agents, and acted upon their reports to him.

The materiality of the alleged misrepresentation does not clearly appear. Whether defendants had obtained an output of from forty to fifty tons per day, or two hundred tons per day, might depend entirely upon the force employed by them, and not be a consequence of the want of capacity in the mines to put out the larger quantity with an adequate force. That the property is very valuable as a coal property is freely admitted by Mr. Hood, complainant's agent for the examination of the property. This witness says that "taking the report of Mr. Lawson as a basis" (an expert sent

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to examine and report upon the property by complainant), "I should say it was a large property, and capable of turning out a large quantity of coal."

To rescind a contract of sale upon the ground of a misrepresentation as to the character, capacity, or quality of the property sold, it ought to be made to clearly appear that such misrepresentation was concerning a material matter, and operated as a material inducement to the purchase.

The next insistence of complainant was, and is, that the defendant company were guilty of such fraudulent concealment of a material fact affecting its title and right of possession as entitles him to a rescission. The facts upon which this allegation rests are substantially these: In 1873 a grant was issued by the State to one B. F. Walker, for a portion of the lands covered by the leasehold estate conveyed to complainant. In 1881 Walker filed a bill in the Chancery Court against the Fox heirs, who are the original lessors under whom the Fox Coal and Coke Company claimed. The object of this bill was to remove the Fox title as a cloud upon the Walker title, to stay waste, and to eject the Fox heirs from the land covered by the grant to Walker. The Fox heirs claimed under a grant much older than that held by Walker, but were unable to connect themselves with it, for the reason that one link in their chain of title was a Sheriff's deed, which they did not support with a record showing judgment and

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levy. Neither Walker or the Foxes had had such continuous, exclusive, adverse possession of the lands covered by both grants as to vest a title under the statute of limitations. Walker failed in his suit, however, because of the effect of the older grant as an outstanding superior title. This suit was finally decided in 1886, and the opinion of this Court, reported in 85 Tenn., 154 *et seq.*, shows fully the facts as to the respective titles and possessions and the ground upon which Walker failed to recover the land claimed by him in that suit.

After losing his ejectment suit, Walker at once instituted another suit, for the purpose of obtaining possession from the Foxes, or those claiming under them, of the lands covered by his grant. For this purpose he brought an action at law of forcible entry and detainer before a Justice of the Peace of Rhea County. Instead of making the Foxes, or their then lessees, Line and Winchester, defendants, he instituted his suit against three *employes* of the lessees, and alleged that they—Davis, Blevins, and Travis—had wrongfully and forcibly entered upon his lands and deprived him of the possession. There was a judgment by the Justice in favor of Walker, and an appeal by the defendants to the Circuit Court. This is the suit which was pending at the time of the sale to complainant. Line and Winchester had in the meantime, and while the suit was pending, sold and assigned their lease to the defendant, the "Fox Coal and Coke Company."

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The fact that this suit was pending was known to the vendor of complainant, and it did not communicate its pendency to the complainant. The contention of complainant is, that inasmuch as neither the Fox Coal and Coke Company nor its remote lessor had any such legal title as would support an action of ejectment to recover possession of the lands embraced by Walker's grant, that the concealment of the pendency of a suit which imperiled the possession of the coal-mines, which were altogether within the Walker claim, was such a fraudulent concealment of a material fact as amounts, in law, to a ground for rescission.

In explanation of the silence of the defendant concerning this suit, involving the rightfulness and legality of its possession, it having received the possession from Line and Winchester pending that suit, defendant says that it attached no importance to the suit, inasmuch as it had been advised by its counsel that Line and Winchester were not parties, and that the possession of Line and Winchester was not affected by its pendency; and that, as it claimed under them, it could not be dispossessed by any judgment in a suit wherein they were not concluded.

The important question upon this issue is as to the possible effect of Walker's suit upon the possession of the assignors of the lease. If the assignor could be ejected under a writ of possession issuing in that case, it would follow that complainant could likewise be ejected if he should

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purchase pending the suit, and receive possession from parties or privies to the pending suit.

The facts appearing in this record, as to the possession of Line and Winchester, are substantially these: At the date of the beginning of Walker's action before the Justice, they, as lessees, had taken possession and opened up coal-mines within the Walker grant. From a bill filed by them to enjoin Walker's suit (but dismissed voluntarily, and hence without prejudice), which is filed as evidence in this cause by complainant, we find that they had a *numerous* force of hands engaged in and about the opening and operation of their coal-mines. *The defendants to Walker's suit were three of these hands.* The employes sued were not tenants of any part of the premises, and did not reside upon the disputed interlap, and had no interest whatever in the lease or in the mining operations. Neither of them was a manager, superintendent, or boss, and neither had any sort of control or authority, as representing the lessees, over the premises or over their fellow-servants. This, we think, is implied from the absence of any averment or evidence indicating the contrary, as well as from the affirmative evidence that they were *mining employes*. Under these facts, was the pending suit one which involved the possession of Line and Winchester? Were they and their other servants and employes liable to be ejected by a writ of possession issuing in that case against their three servants and employes, Davis, Travis, and Blevins?

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Walker's suit did not involve title. It was purely a possessory suit, and was an action which cannot be resorted to as a substitute for an action of ejectment. 9 Yer., 95; 6 Heis., 125.

If the defendant in possession entered peacefully, and without collusion, and in his own right, though he have not the vestige of a title, he can defy even the true owner when sought to be ejected by this summary remedy.

The object of the remedy is to keep him in possession who first lawfully obtained it, and, all considerations of title aside, to restore to possession an occupant who has been forcibly excluded. Undoubtedly such an action will lie against any person actually in possession through force. It does not matter whether such person's possession be for himself or for another.

Were the defendants such persons actually in possession? If so, they might be excluded by means of this summary action. What was the extent of their possession? Was it co-extensive with the limits of the lease to Line and Winchester? If it was, then the plaintiff, by ejecting them, would be restored to the possession of his entire grant. But it seems too evident to need argument that three of a numerous force of hands engaged in operating extensive coal-mines cannot be said to have been in possession of the mines. How can it be then said that the right to remove them from the premises carried with it the right to remove their employers, their superiors,

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their fellow-servants, none of whom were sued, and whose possession and right was equal, if not superior, to that of those sued? If it be said that these defendants were exercising acts of dominion, and committing trespasses, whenever they undertook to aid in the opening or operation of the mine, and that when so engaged they were persons actually in possession, it may be answered that all others engaged with them were equally persons actually in possession. Such others so engaged were not the servants or agents of the persons sued, and could not, therefore, be ejected under the principle applicable when the judgment is against the employer of such servants.

Admitting that under a judgment against a few of a large number of such employes, the few actually sued might be ejected, yet, what is the Sheriff to do when he finds that many other persons not sued have the same kind of possession? Can he exclude them also? If so, upon what principle? It cannot be upon the ground that they are in possession *under* the defendants to his writ, for, demonstrably, this is not the fact. That all are alike servants and employes of a common master does not solve the difficulty, because that common master was not a defendant in the judgment. If the possession of all in a common employment is equal, then the possession of none can be disturbed who were not parties to the proceeding under which it is sought to disturb that possession. That all had a common employer, and that

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each and all were in possession under and for a common employer, does not make such privity as to conclude that employer or any of his servants not actually sued. The case is more like that of a common landlord having many tenants, each holding for himself a part of the premises. If a plaintiff choose to bring ejectment or forcible detainer against a part of these tenants, the judgment would only affect those sued, and there could be no dispossession of others of the same class, but holding independently, though under a common landlord. To use a homely illustration: If a few of many hands employed in a mill, or servants in a hotel, or pupils in a school-house, were sued in an action of forcible entry, brought for the purpose of recovering possession of the mill or the hotel or the school-building, and there was judgment against those made defendants, could it be pretended that, under such a judgment, the hotel or the mill or the school-house could be recovered? While a judgment against the owners of the mill or the hotel would authorize the ejection of such owners, as well as all of their agents, employes, and servants, yet the converse of this—that a judgment against a few of many such servants, agents, or employes, whose possession and occupancy was equal and common, would authorize the exclusion of their fellow-servants and their employers—would by no means follow. Such use of the action of forcible entry is an abuse of the remedy, and one that cannot be tolerated.

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We are clearly of the opinion that the suit of Walker was not one which involved the right of Line and Winchester to the possession. They were not parties to the suit, and were not privies to those who were. We quite concur with the advice of counsel to defendant company that the suit of Walker was not a suit under which they might be dispossessed.

That Line and Winchester assisted these employes in the defense of the suit against them, by employing counsel or otherwise, is of no moment. It did not operate to make them parties. They might have obtained leave to be substituted as defendants, and then obtained the legal right to defend and appeal, and have thus been concluded. This they did not choose to do, and Walker did not choose to make them defendants. What they did in aid of the defendants creates no estoppel. This point has been expressly ruled in reference to an action of ejectment, which was against a tenant. The assistance, through counsel, rendered the tenant by his landlord was held not to conclude the landlord by way of *res judicata* or estoppel. *Boles v. Smith*, 5 Sneed, 105.

That the assignee of complainant was in fact subsequently ejected from these mines by a writ of possession issuing against Davis, Blevins, and Travis, is of no moment in this suit. If they were wrongfully ejected, as we have intimated, their remedy is against those who abused the process of the Court. That fact can cut no fig-

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ure in a bill for rescission. No question upon the covenants in the deed to complainant has or can be made in this case, and none is decided.

We have treated complainant's case as if he had amended his bill and set up his re-acquisition of the title to this leasehold, and had been in position to tender back to defendants the interest acquired under the contract he seeks to rescind. We have deemed it best to meet the questions upon their actual merits, and determine the suit so far as a rescission or abatement of purchase-price was sought.

Affirm the decree of the Chancellor, with costs.

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RAILROAD *v.* ACUFF.

(Knoxville. October 17, 1892.)

1. ACTIONS. *By administrator for personal injuries to intestate cannot be compromised by widow.*

Administrator's suit for personal injuries resulting in his intestate's death, brought on behalf of the "widow and children" of such intestate, cannot be lawfully compromised by the widow alone, without the consent of the administrator or the concurrence of the other beneficiaries.

Cases cited: Greenlee *v.* Railroad, 5 Lea, 418; Stephens *v.* Railroad, 10 Lea, 448; Webb *v.* Railroad, 88 Tenn., 119; Lewis *v.* Brooks, 6 Yer., 180, 181.

2. REPLICATION. *Sufficient to plea of accord and satisfaction without making tender of money received.*

In a personal injury suit the defendant pleaded accord and satisfaction. The plaintiff replied that the compromise thus pleaded was obtained by fraud and undue influence, but did not tender the money that had been paid on the compromise. The plea did not aver payment of money to the plaintiff. No objection was made to replication for want of such tender. When, upon the trial, it was first suggested that no tender had been made, the plaintiff produced the money in Court, and asked leave to amend replication and make formal tender. The amount was credited on plaintiff's recovery.

Held: Judgment will not be arrested for want of tender of money with replication.

3. AMENDMENT. *Of pleadings during trial allowed, when.*

And the Court should have permitted plaintiff to amend his replication and make formal tender during the trial, objection having been then made for the first time.

4. CHARGE OF COURT. *Requests for additional instruction properly refused, when.*

The Court does not err in refusing to give additional instructions upon the request of a party, where the instructions are correct as to one

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count of the declaration but incorrect when applied to another count, and the request is general in terms.

Cases cited and approved: Railroad *v.* Foster, 88 Tenn., 672; Railroad *v.* Smith, 9 Lea, 474; Patton *v.* Railroad, 89 Tenn., 370; Sommers *v.* Railroad, 7 Lea, 201; Railroad *v.* Fain, 12 Lea, 44; Railroad *v.* Wynn, 88 Tenn., 332.

5. RAILROADS. *Correct charge as to observance of statutory precautions.*

Applied to the killing of a deaf and dumb man by a construction train running backwards, the charge is correct in the following language: "Under this statute (§§ 1298-1300 (M. & V.) Code), if the proof shows that the plaintiff's intestate appeared upon the track of the road in front of the running train, then it was the duty of the defendant's employes to have a person on the lookout ahead to sound the whistle, put down the brakes, and use every possible means to stop the train and prevent an accident."

Code construed: §§ 1298-1300 (M. & V.); §§ 1166-1168 (T. & S.).

Cases cited and approved: Patton *v.* Railroad, 89 Tenn., 370; Railroad *v.* Foster, 88 Tenn., 672; Railroad *v.* Wilson, 90 Tenn., 271.

FROM KNOX.

Appeal in error from Circuit Court of Knox County. S. T. LOGAN, J.

WASHBURN, TEMPLETON, PICKLE & TURNER for Railroad.

NELSON & ROGERS for Acuff.

CALDWELL, J. Robert Acuff, a deaf and dumb man, while walking upon the track of the Knoxville, Cumberland Gap and Louisville Railroad

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Company, was overtaken, run over, and killed by a construction train.

Claiborne Acuff, administrator of the deceased, brought this action against the railroad company for the negligent and wrongful killing of his intestate, and obtained a judgment for one thousand dollars.

The railroad company appealed in error.

The administrator brought the suit under Code (M. & V.), § 3130, "for the use and benefit of the widow and children" of his intestate.

The declaration was filed October 29, 1890, and, on November 1, 1890, the railroad company filed a plea of not guilty. On January 8, 1891, it filed a plea of accord and satisfaction, averring that on "December 3, 1890, the defendant paid to Bettie Acuff, the widow of Robert Acuff, deceased, the sum of one hundred dollars, which she accepted in full satisfaction of all claim and demand she, in right both of herself and her children, had against the defendant for the killing of said Robert Acuff;" and that the said settlement with said widow is a bar to this suit, and a satisfaction of all legal claim for damages by reason of said killing."

The administrator demurred to this plea on two grounds: (1) That the widow had no legal right or power to compromise his suit; (2) that, if she could compromise it as to her own interest, she could not compromise it as to the interest of the children.

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The demurrer was overruled by the Court.

That action was erroneous. The demurrer was good, and should have been sustained.

It is true the widow had the first right to sue, and that, if she had availed herself of that right, she could have compromised and disposed of her suit as she pleased, without let or hinderance from any one. Code, §§ 3130 and 3132; *Greenlee v. Railroad Company*, 5 Lea, 418; *Stephens v. Railroad Company*, 10 Lea, 448. But it by no means follows that she had the power to compromise this action brought by another person.

She waived her prior right by permitting the administrator to sue without objection on her part. *Webb v. Railroad Company*, 88 Tenn., 119.

This suit was instituted by the administrator, and in his name. It was his suit, and, being so, he alone had the right to control it. Therefore, one of the beneficiaries, the widow, had no power to compromise the litigation without his consent.

Again, he brought the suit, as he should have done, for the joint benefit of the widow and children of his intestate, and both she and they were rightfully interested in the anticipated recovery. Code, §§ 3130, 3131, 3132; *Greenlee v. Railroad Company*, 5 Lea, 419, 420; *Webb v. Railroad Company*, 88 Tenn., 119.

One of these beneficiaries certainly had no power to compromise the administrator's suit without the concurrence of the other beneficiaries. Such concurrence is not averred in the plea.

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Then, the compromise, as averred, was inoperative for two reasons: (1) Because made without the assent of the plaintiff in the suit; and (2) because not concurred in by all the beneficiaries.

We do not intend, by any thing herein, to decide or intimate that the widow and children, if all of them were *sui juris* and concurring therein, could compromise the suit of the administrator without his consent. That question is not before us.

This Court held, in *Lewis v. Brooks*, 6 Yer., 180, 181, that distributees, as such, could not compromise the administrator's suit without his consent.

After this demurrer was overruled, the plaintiff filed two replications to the plea of accord and satisfaction—the first one being a simple denial of the truth of the plea, and the other averring that the compromise agreement, if ever made, was procured by fraud and undue influence. On this latter replication the defendant joined issue. Upon the issues thus made up, the parties went to trial before Court and jury, with the result already stated.

The railroad company has assigned several errors. The last in order will be considered first. It is that the Court erred in refusing to arrest the judgment. The ground of the motion in arrest was that the plaintiff did not tender with his second replication to the plea of accord and satisfaction the sum received by the widow from the railroad company in the alleged compromise.

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There are three sufficient answers to this assignment, namely:

First.—The plea did not aver that the defendant had paid any money to the administrator, the plaintiff in the suit.

Second.—If a tender had been necessary in the first instance, the defendant waived it by joining issue on the replication.

Third.—When attention was first called to the fact that the tender had not been made, plaintiff's counsel paid into Court, as a tender, the sum received by the widow, with interest, and, before the jury retired to consider of their verdict, moved the Court to be allowed to so amend the replication as to make a formal tender of the money.

The amendment was refused, presumably on the ground that the Court did not think it necessary to the sufficiency and efficacy of the replication. Had it been a proper case for a tender, or one requiring it to make the replication good, the Court should have allowed the amendment.

The Court adjudged that the recovery be credited with the amount paid the widow, and interest thereon, awarding execution for only eight hundred and ninety-four dollars. The defendant certainly was not entitled to more, either under the pleadings or the proof with reference to the alleged compromise.

Most of the other assignments relate to the action of the trial Judge in refusing to submit to the jury, as parts of his charge, several proposi-

` Railroad v. Acuff.

tions of law presented by counsel for the railroad company. As these propositions concern only the alleged compromise with the widow, and the failure of the plaintiff to tender with his replication the money received by her, it is not necessary that they should be noticed in detail. It is sufficient to say of them that, whether sound or not abstractly, they become entirely immaterial and inapplicable in this case, in view of the widow's inability to make a binding compromise of the suit, and what has already been said with respect to the question of tender.

For reasons heretofore stated, the questions of compromise and tender should have had no part in the trial of this case; and hence, if any error had been committed in the matter of charge with respect thereto (which is not decided), that error could not be otherwise than immaterial and without prejudice to the railroad company.

It is assigned as error that the Court refused to charge as follows: "If the jury shall find that the deceased was deaf and dumb, and shall further find that on the morning of the killing he was warned of unusual danger from walking the track, by reason of the irregular running of a construction train, or for any other cause, and advised to take the dirt road, and still deceased, regardless of the warning, chose to walk on the railroad track, knowing that he could hear no signal, this would be such negligence as would bar recovery, and you should so find."

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The record recites that the Court refused to give this instruction, "because counsel asked that it be applied to both counts of the declaration." The reason given sustains the action of the Court.

The declaration contained two counts—one for negligence at common law, and the other for failure to observe statutory precautions for the prevention of accidents when obstructions appear upon the track.

Contributory negligence might have defeated the common law action, but not that based upon the statute. As to the latter, it could be considered only in mitigation of damages. *Railroad Company v. Foster*, 88 Tenn., 672; *Railroad Company v. Smith*, 9 Lea, 474; *Patton v. Railroad Company*, 89 Tenn., 370.

Therefore, while the instruction requested may have been good law as applied to the first count, it was manifestly not so with respect to the second count, and the Court properly refused to give it.

To authorize a reversal on account of the refusal of the trial Judge to give an instruction requested, that instruction, as written, must be strictly accurate and applicable to the case in hand; especially if it relate to a subject embraced in the general charge, as was true here. *Sommers v. Railroad Company*, 7 Lea, 201; *Railroad v. Fain*, 12 Lea, 44; *Railroad v. Gurley*, *Ib.*, 59; *Railway Company v. Wynn*, 88 Tenn., 332.

The Court had already told the jury what would defeat the common law action, and, in a

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separate paragraph, what would defeat the statutory action, and to those parts of the charge no objection is made.

Finally, error is assigned upon the charge given as to the second count in the declaration. After appropriately quoting §§ 1298, 1299, and 1300 of the Code as forming the basis for that count, the Court said: "Under this statute, gentlemen of the jury, if the proof shows that the plaintiff's intestate appeared upon the track of the road in front of the running train, then it was the duty of the defendant's employes to have a person on the lookout ahead to sound the whistle, put down the brakes, and use every possible means to stop the train and prevent an accident."

That instruction is supported by a long and unbroken line of decisions. See *Patton v. Railroad Company*, 89 Tenn., 370; *Railroad Company v. Foster*, 88 Tenn., 672, and cases therein cited.

That the train, in this case, was made up and operated, at the time of the accident, with the engine behind and pushing the cars, can make no difference; for the statute is applicable whether the train be moving backward or forward, with engine before or behind. *Railway Company v. Wilson*, 90 Tenn., 271.

Affirm, with costs.

Rogers *v.* Hargo.

ROGERS *v.* HARGO.

(Knoxville. October 26, 1891.)

BUILDING AND LOAN ASSOCIATIONS. *Method of adjustment of affairs of insolvent company.*

In winding up the affairs of an insolvent building and loan association, the following rules are observed, to wit: The borrowing stockholder is charged with the money actually received by him, treating same as due and drawing interest from date of its receipt. He is credited by all payments of interest and premium as of dates when made. The balance due is ascertained by calculation upon the principle of partial payments. He is not allowed credit for amounts paid as dues on his stock. After all liabilities of the company are paid, the remaining fund is distributed *pro rata* among stockholders, whether borrowers or not, upon the basis of the amounts paid by them respectively as dues upon their stock.

Case cited: 8 Atlantic Rep., 843-845.

FROM KNOX.

Appeal from Chancery Court of Knox County.
H. R. GIBSON, Ch.

J. L. ROGERS for Rogers.

WALTER M. COCKE for Hargo.

CALDWELL, J. C. H. Rogers, as receiver of the New South National Building and Loan Associa-

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tion, filed this bill to collect from J. W. Hargo, one of the share-holders of that corporation, an alleged debt of seven hundred dollars, evidenced by a certain loan note, and secured by mortgage on real estate.

The Chancellor heard the cause finally on pleadings, exhibits, and an agreed statement of facts. From his decree both parties have appealed.

It appears from the "agreed facts," so far as necessary to be here stated:

First.—That the defendant, being the holder of ten shares of capital stock in said corporation, "obtained a loan" of money from it, and executed the note in suit therefor; and that for several months he paid certain "dues upon his stock," and certain other sums as "interest and premiums upon his said loan."

Second.—That within two years after the organization of said corporation, it was dissolved by decree of Court in another cause, wherein the complainant in this cause was appointed receiver, with direction to collect all debts due to the corporation—that decree not specifying, however, what credits, if any, should be allowed borrowing members on their notes.

Third.—"That said corporation is insolvent; by which is meant that it is not able to pay its debts or the amounts paid in by its stockholders of all classes in full, but that a loss in a final adjustment of its affairs will have to fall upon its stockholders, who will receive something upon their

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stock, but the exact amount of loss cannot yet be definitely known."

The contention of each party to this litigation is then stated, as follows:

"Upon these facts the defendant insists that, in repaying his loan to the complainant, he should be charged with the amount of money received by him from said corporation, with interest thereon at the rate of six per cent., and be credited with the full amount paid by him upon his stock in said corporation, and upon interest and premium upon his loan, upon the principle of partial payments. The complainant insists that the defendant should not be credited, in the payment of his loan, with the sums that he paid upon his stock, but that his payments upon stock should remain to his credit, to be paid him upon final settlement of the affairs of the corporation, upon the same ratio as payments on account of stock shall be made to other stockholders, both borrowers and investors, the payments to be made to all alike."

The insistence in behalf of the defendant is in accord with the view of Mr. Endlich, as expressed in Section 496 of his work on the Law of Building Associations. In the concluding part of that section the author, in laying down the rule for settlement with a borrowing member of a dissolved association, says: "He is to be charged, therefore, only with the amount he has actually received, with legal interest, and credited with all his pay-

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ments upon stock and interest, upon the principle of partial payments."

But to the contrary, and in support of complainant's insistence, is the case of *Strohen v. Franklin Saving Fund and Loan Association*, decided by the Supreme Court of Pennsylvania, in 1887, and reported in the *Atlantic Reporter*, Vol. VIII., pages 843-845. The Court, in that case, said: "The insolvency of the company, as before observed, puts an end to its operations as a building association. To a certain extent, it also ends the contract between it and its members respectively, and nothing remains but to wind it up in such a manner as to do equity to creditors and between the members themselves. As regards the latter, care should be taken to adjust the burdens equally, and not to throw upon either borrower or non-borrower more than their respective share. That result may be reached by requiring the borrower to repay what he actually received, with interest. He would then be entitled, after the debts of the corporation are paid, to a *pro rata* dividend with the non-borrower for what he had paid upon his stock. He will thus be obliged to bear his proper share of the losses. To allow him to credit upon his mortgage his payments on his stock, would enable him to escape responsibility for his share of the losses, and throw them wholly upon the non-borrowers. In other words, the borrower would escape without loss. It will not do to administer the affairs of an insolvent corporation in this manner."

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This latter authority announces the sounder of the two rules. The reasoning of the Court, as there given, fully indicates the conclusion reached. To our minds it seems unanswerable. Without further discussion or elaboration, we are content to adopt and follow the decision of the Pennsylvania Court.

Charge defendant with money actually received by him, treating same as due and drawing interest from time received; and credit him thereon by payments of interest and premium when made. Ascertain balance due, making calculation upon principle of partial payments, and give recovery for such balance.

Let amount paid by defendant as dues on stock stand to his credit on the books of the corporation until time for final adjustment, when he and all other stockholders, borrowers and non-borrowers, will be paid *pro rata* from the fund for ultimate distribution. Thus the loss will be apportioned equally.

Modify decree accordingly.

DeArmond *v.* DeArmond.

DEARMOND *v.* DEARMOND.

(*Knoxville.* November 1, 1892.)

1. DIVORCE. *Insufficient affidavit to bill for.*

Complainant's affidavit to divorce bill was in these words, to wit: "That the statements made in the above bill of her own knowledge, are true, and those made upon information she verily believes to be true, and that the above complaint is not made out of collusion, but in sincerity and truth, and for the purposes expressed in the bill."

Held: This affidavit is fatally defective in several particulars: (1) It fails to state that the complaint was not made out of "levity." (2) It fails to negative collusion "with the defendant." (3) It fails to state that the complaint was made for the "causes" mentioned in the bill.

Code construed: § 3311 (M. & V.); § 2453 (T. & S.).

2. SAME. *Court's jurisdiction dependent upon sufficiency of affidavit.*

In divorce causes the Court acquires no jurisdiction if, in any material respect, the affidavit to the bill fails to comply with the prescribed statutory form of affidavit.

Cases cited: Hackney *v.* Hackney, 9 Hum., 453; Stewart *v.* Stewart, 2 Swan, 591.

3. SAME. *Same.*

And, in such case, this Court will dismiss the suit, upon its own motion, although no question has been made by the defendant in this or the lower Court upon the sufficiency of the affidavit.

FROM KNOX.

Appeal from Chancery Court of Knox County.
H. R. GIBSON, Ch.

DeArmond v. DeArmond.

S. P. FOWLER and E. F. MYNATT for Complainant.

A. G. HOWE and WALTER M. COCKE for Defendant.

T. S. WEBB, Sp. J. This is a divorce bill by a wife against her husband, seeking a divorce upon the grounds of cruel and inhuman conduct, failure to support, and habitual drunkenness.

The other defendants are made parties for the purpose of reaching property in their hands alleged to belong to the husband, and subjecting it to complainant's claim for alimony.

The Chancellor decreed a divorce from bed and board, and alimony. The husband has appealed and assigned errors.

The first error assigned is that the affidavit to the bill is fatally defective. The language of the affidavit, as it appears in the record, is as follows:

"That the statements made in the above bill of her own knowledge, are true, and those made upon information she verily believes to be true, and that the above complaint is not made out of collusion, but in sincerity and truth, and for the purposes expressed in the bill."

Section 2453 of the Code prescribes the affidavit to be made to a divorce bill, and is as follows:

"The bill shall be verified by an affidavit, upon oath or affirmation, before a Justice of the Peace, or the Judge or Clerk of the Court, that the facts stated in the bill are true, to the best of

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the complainant's knowledge and belief, and that the complaint is not made out of *levity* or collusion *with the defendant*, but in sincerity and truth, for the *causes* mentioned in the bill."

The defects in the affidavit in question are:

First.—It does not state that the complaint is not made out of "levity."

Second.—It does not state that the complaint is not made out of collusion "with the defendant."

Third.—It does not state that the complaint is made for the "causes" mentioned in the bill.

Complainant's counsel contends that the omission to negative "levity" is not material, because the affidavit does state that the complaint is made in "sincerity," and that this necessarily means that it is not made out of levity.

If this contention is true, then the requirement of the statute as to levity is mere surplusage, and could have been omitted from the statute entirely. We cannot accede to this proposition. The Legislature intended to require the complainant not only to show that the complaint was not made from an improper motive, but to go further, and show affirmatively that it was made from the proper motive. So, also, the Legislature has determined that a mere general averment of a good motive will not be sufficient, but has required the complainant to go further and expressly aver the absence of improper motives. Complainant might well assume that her sincere *desire* for a divorce, even when she had no legal grounds for it, would

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justify her in swearing that the complaint is made in sincerity. While she is thus evasively swearing that the complaint is made in sincerity, she might at the same time know that the facts stated by her in the bill as grounds for divorce, while technically true, were susceptible of such explanation as would defeat her right to divorce. For instance, she might charge adultery against her husband, and the charge might be true, and yet she had condoned it. Upon this state of facts, she could not truly swear that the complaint was not made out of levity. The Legislature intended to make such an evasion impossible, and to compel an applicant for divorce to use the utmost good faith toward the Court. We are not to be understood as holding that no other words negativing levity, except those used in the statute, can be employed in the affidavit; but what we do hold is that it is essential that levity be negated in the affidavit, and this is not done in the affidavit now before us.

Again, the affidavit negatives collusion generally, but does not expressly negative collusion *with the defendant*, which is the particular and only collusion intended to be guarded against. If the general negativing of collusion does not include and certainly negative collusion "with the defendant," then it is not a compliance with the statute. We think that it does not negative collusion with the defendant. A complainant might justify a general denial of collusion, by claiming that she had not

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colluded with her father or brother or son, and might, at the same time, be acting in collusion with her husband. No room must be left for such an evasion.

This Court has said that the marriage relation is the most sacred of domestic relations, and the Legislature has plainly expressed its intention to protect this sacred relation from any collusive attack by the husband and wife. To this end, it has plainly required a written affidavit that this particular collusion does not exist.

Again, the affidavit states that the complaint is made for the "purposes" expressed in the bill, instead of for the "causes" mentioned in the bill. The *purposes* expressed in the bill are to secure a divorce and alimony. The *causes* mentioned in the bill are the grounds for the divorce. Code, § 2452, requires that the bill shall "set forth particularly and specially the causes of the complaint, with circumstances of time and place with reasonable certainty." The affidavit is required to show that the complaint is made for these *causes*. If an affidavit that the complaint is made for the *purposes* expressed in the bill is held to fulfill this requirement, then the room for evasion is palpable, and this part of the affidavit would be useless.

Any of the defects in the affidavit above considered were fatal in the Court below, unless cured by amendment.

A more important question, however, is whether this Court can now notice these defects, in the

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absence of any action on them by the Court below, and in the absence of any objection by the defendant to the affidavit in the Court below.

It is quite clear that the defendant has waived his right to object to the affidavit; and, so far as he is concerned, the objection cannot be made here for the first time. But if the affidavit required by the statute is essential to the jurisdiction of the Court, then the decree of the Chancellor has been pronounced in a cause of which he did not have jurisdiction, and it is our duty to dismiss the bill. This question is now before this Court for the first time.

In the case of *Hackney v. Hackney*, 9 Hum., 453, the question is suggested by Judge McKinney, but was not really involved, and was not decided.

In the case of *Stewart v. Stewart*, 2 Swan, 591, the cause of divorce stated in the bill was that the defendant had abandoned her husband's home "without any just or probable cause," and it was not stated that the abandonment was "willful and malicious." The Court held that no cause of divorce was stated, and that all proof under such an averment was irrelevant and useless, and no decree for divorce could be made. In that case a *pro confesso* had been taken against the defendant, and, of course, no objection to the defective averments of the petition had been made in the Court below.

Assuming that the causes of divorce are stated

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in the bill before us with sufficient particularity, still the fact remains that the affidavit is substantially defective, and the question is whether the Court below could take jurisdiction of a divorce bill not verified by the statutory affidavit. We think it could not.

The peace and happiness of society largely depend upon maintaining the marriage relation, and the policy of the State is to encourage and maintain that relation. For the protection of society against the manifold evils that would necessarily flow from the wanton and indiscriminate severing of that relation, the Legislature has declared that divorces shall not be granted, except for certain causes, which are distinctly set out in the statute; and has prescribed what allegations shall be made in the bill or petition for divorce, and how the bill or petition shall be verified. All of these requirements of the statute are for the benefit of society, and not for the benefit of the parties. They are intended to guard against the bad faith and collusion of the parties. The application must show a clean and meritorious case under the statute before the Court can take jurisdiction of the cause. The statutory affidavit is an essential part of the application, and without it there is no jurisdiction.

The affidavit in this case is fatally defective in substance, as already shown. The result is that the decree of the Chancellor is reversed, and the bill dismissed, with costs.

Vance & Kirby v. McNabb Coal, Etc., Company.

VANCE & KIRBY v. MCNABB COAL, ETC., COMPANY.

(Knoxville. November 1, 1892.)

1. CORPORATIONS, PRIVATE. *Assets of, constitute trust fund for benefit of creditors.*

The assets of a corporation constitute, as between itself and its creditors, a trust fund for the payment of its debts. These assets cannot be lawfully distributed among share-holders, or, *a fortiori*, diverted to mere volunteers, while corporate debts remain unpaid. Creditors may pursue the person wrongfully obtaining such assets, for their value, or for the assets in kind.

Cases cited and approved: 7 Wall., 410; 15 How., 527.

2. SAME. *What constitutes fraudulent conveyance of corporate assets.*

The transfer of corporate assets is fraudulent and void, as against creditors of the company, where an old corporation, being indebted, conveys all its property, upon a nominal or grossly inadequate consideration, and without making provision for its creditors, to a new company brought into existence through the agency of the officers of the old company, and for the sole purpose of such transfer. The creditors of the old company may, in such case, follow the assets in the hands of the new company, if the rights of innocent purchasers have not intervened.

Cases cited and approved: 56 N. Y., 563; 114 U. S., 594; 7 Wall., 409; 15 How., 507; 102 U. S., 161; 134 U. S., 287; 13 Fed. Rep., 516.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.
T. M. McCONNELL, Ch.

WHITE & MARTIN for Vance & Kirby.

Vance & Kirby v. McNabb Coal, Etc., Company.

EAKIN & DICKEY for McNabb Coal, etc., Co.

CALDWELL, J. This bill was filed by the creditors of the McNabb Coal and Coke Company to set aside an alleged fraudulent conveyance of its property, and wind up and settle its affairs as an insolvent corporation.

The McNabb Coal and Coke Company was a foreign corporation, much indebted, owning large property, and doing business in Tennessee. For the purpose of acquiring title to that property, and probably at the instance of the officers of that company, another corporation, known as the Consolidated Coal and Iron Company, was chartered in this State on February 22, 1887; and on the same day the McNabb Coal and Coke Company conveyed to the Consolidated Coal and Iron Company about 16,000 acres of its lands, they being the greater part and most valuable of its property, for the recited "consideration of one dollar and other valuable considerations to be paid" by the vendee.

The minutes of a certain meeting of the officers and share-holders of the selling company show those "other valuable considerations" to have been the promise of a large share of paid-up capital stock in the purchasing company, the exact contract being that the McNabb Coal and Coke Company should receive for those lands "the sum of two million five hundred thousand (\$2,500,000) dollars, payable in stock of the Consolidated Coal and

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Iron Company, fully paid up;" \$1,000,000 of said stock to be donated to the latter company, and to remain in its treasury, and be sold as the needs or demands of the company might require in the extension of its business and the acquisition of other lands; \$200,000 of said stock to be donated to said company "to be immediately sold for equipping said lands to do a coal business;" and, finally, that \$300,000 of said stock be covered into the treasury of the purchasing company, as security until the incumbrances on said lands, amounting to about \$150,000, shall be paid and canceled.

Though formally executed, this deed was not registered at once, and the McNabb Coal and Coke Company seems to have remained in possession of the property a few months after its date.

Thereafter, the McNabb Coal and Coke Company made an option contract with J. D. McNeale and E. R. Donohue, whereby it agreed to sell them the same 16,000 acres of land, as well as the balance of its property, real and personal, and also \$115,000 of its bonds, then ready to be issued and put on the market; and, for all these, they were to pay the McNabb Coal and Coke Company, \$60,000 in money and "a certain amount of stock in a new corporation," to which it was intended all of said realty and personality should be transferred; and they were also to pay into the treasury of such new corporation \$20,000 in cash, and settle a mortgage for \$35,000 on one of the tracts of land. It was further stipulated in that contract

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that McNeale and Donohue should give, as a *bonus* to the purchasers of the \$115,000 of bonds, such an amount of the stock of the prospective corporation as they saw fit, not to exceed \$280,000.

Under that option, they sold the \$115,000 of bonds to C. W. Short, he agreeing to pay the above-named sums of \$60,000, \$20,000, and \$35,000, as they had agreed to do. And, in the contract with Short, which was approved by the selling company, it was agreed that the "new corporation" contemplated should issue \$1,000,000 of paid-up capital stock—\$200,000 to Short, as a *bonus*, \$200,000 to McNeale, \$200,000 to Donohue, and \$400,000 to the "McNabb Coal and Coke Company, as a part of the purchase-price."

This agreement was reduced to writing and signed on August 4, 1887.

It was never fully carried out. The "new corporation" had in view was never organized, and no deed was ever made by the McNabb Coal and Coke Company, under and in pursuance of the option contract.

About this time the Consolidated Coal and Iron Company appears upon the scene again. Manifestly, that corporation had been organized with a view of succeeding the McNabb Coal and Coke Company in its property and business, and upon the distinct agreement with certain gentlemen, who signed the charter and were in the first board of directors, that they would resign from the directory whenever the real promoters of the enterprise

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should so desire. Accordingly, those gentlemen did resign on August 4, 1887, the day the option agreement was finally closed, and in their stead, at the same meeting, were elected several other directors, among them J. D. McNeale, E. R. Donohue, W. B. Burnett, and G. N. Leighton—the first two being the same persons who had obtained the option contract from the McNabb Coal and Coke Company, and the latter two being president and general manager, respectively, of that corporation. F. J. Mitchell, who was secretary of both corporations, was present at that meeting, and recorded its action.

On August 6, 1887, G. N. Leighton and another turned the whole of the property of the McNabb Coal and Coke Company over to said McNeale and Donohue for the Consolidated Coal and Iron Company; and six days later, the deed, executed on February 22, 1887, was filed for registration.

On August 19, 1887, G. N. Leighton, for the McNabb Coal and Coke Company, submitted a proposition, as follows:

“The Consolidated Coal and Iron Company:

“DEAR SIRS—Referring to a proposition made by the McNabb Coal and Coke Company through me, on February 22, 1887, and accepted by you, and subsequently carried out in part, I desire, on behalf of the McNabb Coal and Coke Company, to propose certain modifications. The deed for the two parts referred to in said proposition to wit, the

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11,500 acres tract * * * and the 4,239 acres tract * * * has been delivered to you, and I propose that the interest of the McNabb Company in the 2,891 acres tract, known as the McNabb tract, and the interest of the McNabb Company in the Florence Coal, Coke, and Iron Company shall be transferred to you. In payment therefor, and for the two tracts as above, all the stock of the Consolidated Coal and Iron Company shall be issued to me, being \$2,500,000 of said stock; of which \$1,500,000 shall be by me covered back into the treasury of the Consolidated Coal and Iron Company; \$200,000 shall be by me assigned and transferred to C. W. Short; \$200,000 to J. D. McNeale; and \$200,000 to E. R. Donohue; \$400,000 of said stock shall remain in the treasury of the company for the benefit of the parties interested in the McNabb Company, in accordance with the terms agreed upon by the said McNabb Company, and the terms of a contract entered into between the McNabb Company, J. D. McNeale, and E. R. Donohue; to be issued in the future in accordance with instructions to be received from the McNabb Company. Said stock shall be paid-up stock, and the transfer of the McNabb tract shall include all improvements, steam-boat, barges, stock of goods, and property of all sorts belonging to the McNabb Company in the States of Tennessee and Alabama."

At a meeting of the directors of the Consolidated Coal and Iron Company, on September 5,

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1887, "on motion of C. W. Short, seconded by J. D. McNeale, the foregoing proposition was accepted by the following vote: E. R. Donohue, aye; C. W. Short, aye; S. W. Pierce, aye; G. N. Leighton, —; W. B. Burnett, aye; J. D. McNeale, aye."

Soon thereafter, the Consolidated Coal and Iron Company was stocked at \$2,500,000, and the shares of stock were issued as provided in Leighton's last proposition, except that the \$400,000 of stock belonging to the McNabb Coal and Coke Company were issued to the individuals owning stock in that company.

Short complied with his part of the option agreement, except that, instead of paying \$20,000 into the treasury of a new corporation to be thereafter organized, he paid that sum into the treasury of the previously existing Consolidated Coal and Iron Company, to be by it used as a part of its working capital. He settled the mortgage for \$35,000, and paid \$60,000 to the McNabb Coal and Coke Company, as he had agreed to do, and that company seems to have used the same in the payment of debts.

The Consolidated Coal and Iron Company, on March 5, 1888, mortgaged all of its real estate to the Farmers' Loan and Trust Company, of New York City, to secure an issue of \$300,000 of bonds.

On March 22, 1890, these complainants, on behalf of themselves and other creditors of the McNabb Coal and Coke Company, filed this attachment and injunction bill against that company and

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the Consolidated Coal and Iron Company, and various officers and share-holders in said companies, for the purposes stated in the opening sentence of this opinion, and for other purposes collateral thereto.

The facts hereinbefore recited, and many other facts not necessary to be mentioned, were disclosed in great detail by the answers of the defendants and by proof introduced on the trial before the Chancery Court.

The Chancellor correctly adjudged that the McNabb Coal and Coke Company was indebted to various creditors in separate sums, aggregating \$4,358.92, for which execution was awarded.

He further adjudged that the \$20,000 paid to the Consolidated Coal and Iron Company by C. W. Short was an asset of the McNabb Coal and Coke Company, for which the former company should account to the creditors of the latter company; and, upon that ground, he further adjudged that the said creditors of the McNabb Coal and Coke Company recover of the Consolidated Coal and Iron Company the said sum of \$4,358.92, and awarded execution.

For a time all parties acquiesced in that decree. But, after execution was issued and returned *nulla bona*, the complainants, and then the Consolidated Coal & Iron Company, sued out writs of error, and brought the cause to this Court.

It is perfectly obvious that the decree is appropriate, and rested upon sound reason, as far as it

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goes. The \$20,000 paid by Short to the Consolidated Coal and Iron Company was part of the consideration due from him to the McNabb Coal and Coke Company for its \$115,000 of bonds purchased by him, and, as a consequence, the Consolidated Coal and Iron Company had no legal right whatever to the money. Its receipt and holding of the money, under whatever claim or pretense, was, in legal contemplation, for the use of the true owner, the McNabb Coal and Coke Company. By taking the money into its treasury, the Consolidated Coal and Iron Company became, as it were, a trustee in its own wrong for the benefit of the creditors of the McNabb Coal and Coke Company, and in that capacity it must be held responsible in a Court of Equity.

It is quite as clear that the Chancellor did not go far enough in the measure of relief granted.

By every rule of law and equity the \$400,000 of capital stock issued by the Consolidated Coal and Iron Company to the share-holders of the McNabb Coal and Coke Company belonged to the latter company in its corporate capacity, as assets for the benefit of its creditors in the first instance. That stock was the only consideration actually passing from the purchasing to the selling company for its property, and could not rightfully be appropriated by share-holders, as was done, to the detriment of creditors.

The consideration of the deed of February 22, 1887, though that deed did not cover all the

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property, was, as has already been seen, not less than \$1,000,000 of paid-up capital stock, to be issued to the McNabb Coal and Coke Company. The option contract, made with McNeale and Donohue some five or six months later, recited that \$400,000 of the capital stock in the proposed "new corporation" should be issued to the "McNabb Coal and Coke Company, as part of the purchase-price;" and by the final proposition, under which the Consolidated Coal and Iron Company claim to have acquired the whole property, the \$400,000 of stock provided "for the benefit of the parties interested in the McNabb Company," was to be held "in accordance with the terms agreed upon" by the parties to the option contract, which, as just seen, recited that it should go to the "McNabb Coal and Coke Company as part of the purchase-price."

Then, treating the sale and purchase of the property as in every way legitimate and binding, the \$400,000 of stock was a part of the price paid, and, as such, belonged primarily to the selling company, and not to its share-holders as such. Therefore, the persons receiving and appropriating that stock were guilty of a conversion, and thereby became individually responsible to the creditors of the McNabb Coal and Coke Company, each for the value of the shares taken by him.

After stating that equity regards the property of a corporation as held in trust for the payment of its debts, the Supreme Court of the United

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States, in a well-considered case, said: "Assets derived from the sale of the capital stock of the corporation, or of its property, become, as respects creditors, the substitutes for the things sold, and, as such, they are subject to the same liabilities and restrictions as the things sold were before the sale, and while they remained in the possession of the corporation. Even the sale of the entire capital stock of the company, and the division of the proceeds of the sale among the stockholders, will not defeat the trust nor impair the remedy of the creditors, if any debts remain unpaid, as the creditors, in that event, may pursue the consideration of the sale in the hands of the respective stockholders, and compel each one, to the extent of the fund, to contribute *pro rata* towards the payment of their debts out of the moneys so received and in their hands." *Railroad Company v. Howard*, 7 Wallace, 410.

To the same effect is *Carson v. State of Arkansas*, 15 Howard, 527; 2 Story's Eq. Jur., Sec. 1252, and other authorities there cited.

But complainants are entitled to more comprehensive relief than any yet mentioned. The deed and other contracts by which the McNabb Coal and Coke Company undertook to pass the title to all its property to the Consolidated Coal and Iron Company are fraudulent and void as against creditors of the former company.

The Consolidated Coal and Iron Company was organized by the sanction and concurrence, if not

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solely at the instance, of the officers of the McNabb Coal and Coke Company, for the express and single purpose of acquiring the latter's property; and the transition was soon accomplished, mainly through the efforts of those same officers, who, in the meantime, had become directors in the other company.

Moreover, the Consolidated Coal and Iron Company did not pay, or assume to pay, any thing for all this valuable property, save the nominal consideration of one dollar. True, it bound itself to issue a small part of its stock to the McNabb Coal and Coke Company, but that, under the facts of this case, did not constitute a valid consideration, or relieve the transfer of the just imputation of fraud; for the only basis of its stock was the property received from the McNabb Coal and Coke Company. That stock had nothing else to rest upon or to give it value; from no other source did the Consolidated Coal and Iron Company receive a dollar of capital either in money or property. At best, it is but an effort to make a sale whereby the purchase-price is to be paid by a return to the seller of a small part of the property sold, and the buyer is to retain the larger part and pay nothing for it.

The president of the McNabb Coal and Coke Company says the consideration received by that company for its property was the different sums of \$60,000, \$35,000, and \$20,000, paid by C. W. Short. But that cannot be so; first, because the deed was executed long before he paid those sums,

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and upon an entirely different consideration; and, secondly, because he made those payments as the consideration for the \$115,000 of bonds purchased by him. The only connection those payments had with the sale of property to the Consolidated Coal and Iron Company lies in the fact that he received of that company's stock a *bonus* of \$200,000, by previous agreement with McNeale and Donohue as owners of an option, which was never made available, except as to the sale of the bonds.

The truth is, that by a series of unusual offers and agreements, one corporation, while largely indebted and without providing for its creditors, has, without a valid consideration, denuded itself of all its property, and vested the same in another corporation, conceived and brought into existence for the sole purpose of such successorship.

A transaction of that kind will not stand for a moment against creditors of the former corporation, but they may follow and subject the property in the hands of the latter corporation, the same as if no transfer had been made. Only the rights of subsequent innocent purchasers for value can intervene and prevent that result.

This is a familiar principle of law with reference to fraudulent conveyances, applicable to corporations and individuals alike:

"Corporations cannot, any more than individuals, relieve their property from the payment of debts, except by a sale and transfer in good faith, and for a full consideration." *Rorke v. Thomas*, 56 N.

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Y., 563; *Wabash, St. Louis & Pacific Railway Co.* v. *Ham*, 114 U. S., 594; 2 Morawetz on Private Corporations (2d Ed.), Sec. 789.

"Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it into whosesoever possession it may be transferred, unless it has passed into the hands of a *bona fide* purchaser." *Railroad Company v. Howard*, 7 Wallace, 409; *Carson v. State of Arkansas*, 15 Howard, 507; *Graham v. Railroad Company*, 102 U. S., 161; 2 Story's Eq. Jur., Sec. 1252; Wait on Insolvent Corporations, Secs. 150 and 156; 2 Morawetz on Private Corporations, Sec. 789; *Chicago Railway Company v. Chicago Bank*, 134 U. S., 287.

In *Hibernia Insurance Company v. St. Louis and New Orleans Transportation Company* the Court, as correctly stated in the head-note, held that "equity will not permit the stockholders in one corporation to organize another, and transfer all the corporate property of the former to the latter, without paying all the corporate debts;" and that, "where such a transfer is made, the obligations of the old corporation may be enforced against the new to the extent of the assets received by it." 18 Fed. Rep., 516.

In another case, where it appeared that no fraud was intended by either party, the Court held that "a new corporation which takes, as owner, all the property and assets of an old corporation (which

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is dissolved without providing for all its debts), must pay the debts of the old corporation, at least to the amount of the assets converted." 16 Fed. Rep., 140.

Though the transfer of its property by the McNabb Coal and Coke Company was inoperative and void as to complainants, they are not entitled to a sale under their attachment, because the proof discloses the existence of a mortgage upon the attached property prior in date to the filing of the bill, and the mortgagee is not before the Court. The validity of the mortgage is not impeached in the bill. In fact, its existence seems not to have been known to complainants until disclosed in the proof, and they did not then attack it by amendment, as they might have done upon proper ground.

Complainants may elect to ratify the transfer of its property by the McNabb Coal and Coke Company, and recover the value of the \$400,000 of stock from the persons receiving it; or they may avoid the transfer altogether, and pursue the property or its proceeds in the hands of the Consolidated Coal and Iron Company, subject to any rights that may have been acquired by subsequent *bona fide* purchasers for value.

Enter decree in accordance with this opinion, and allow sixty days for defendants to pay into this Court the amount of debts adjudged, with interest and costs. If such payment should not be so made, the cause will be remanded for further appropriate proceedings.

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STATE, *ex rel.* RAMBO, *v.* MALONEY.

(Knoxville. November 5, 1892.)

1. COUNTY JUDGE. *His term of office. Example.*

A county judgeship for Knox County was created by Acts 1887, Chapter 148, and the term of office fixed, by the statute, at four years. Maloney was elected in 1888 to fill said office for said term. In 1892 Rambo was elected as his successor. Maloney refused to surrender the office upon Rambo's demand, and insisted that he was entitled to hold the office for the full term of eight years allotted to Judges of "inferior Courts" by the Constitution. Rambo brought this suit to oust Maloney.

Held: That Maloney's term expires, under Constitution of 1870, on first of September, 1894. The statute is unconstitutional and void, so far as it undertakes to fix the term at four years. Maloney holds, not for a full term of eight years from date of his election, but only for the unexpired judicial term—viz., six years.

Constitution construed: Art. VI., Secs. 1, 2, 3; Art. VII., Sec. 5.

Act construed: Acts 1887, Ch. 148.

2. SAME. *Is a Judge of an inferior Court.*

A County Judge is a Judge of an inferior Court within the meaning of those clauses of the Constitution which authorize the creation of "other inferior Courts" in addition to those specifically named, and provide for election of Judges for said Courts, and prescribe their terms of office at eight years.

Constitution construed: Art. VI., Secs. 1, 2; 3; Art. VII., Sec. 5.

Cases cited and approved: State *v.* Glenn, 7 Heis., 472; State *v.* McKee, 8 Lea, 24; State *v.* Leonard, 86 Tenn., 485.

3. SAME. *Vacancy in, filled only for unexpired term.*

The judicial term is uniform under Constitution of 1870, the first term beginning first of September, 1870, and ending first of September, 1878, and a new term beginning at the latter date, and at the expiration of each succeeding term of eight years thereafter. Vacancies occurring during a judicial term are filled, not for a full term of eight

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years from the date of occurrence, but for the unexpired judicial term. A county judgeship created during a judicial term, is, in legal contemplation, a vacancy, and filled as such.

Constitution construed: Art. VII., Sec. 5.

Cases cited and distinguished: Powers *v.* Hurst, 2 Hum., 24; Brewer *v.* Davis, 9 Hum., 209; Keys *v.* Mason, 3 Sneed, 8.

FROM KNOX.

Appeal from Chancery Court of Knox County.
S. T. LOGAN, J., sitting by interchange.

WASHBURN, TEMPLETON, PICKLE & TURNER for Rambo.

JAMES COMFORT and HENDERSON & JOUROLMON for Maloney.

CALDWELL, J. This case involves the title to the office of County Judge of Knox County. It is an "agreed case," submitted to the Chancery Court upon the following written stipulation:

"The aforesaid parties, stated as complainant and respondent in the caption hereof, beg leave to submit to your Honor's adjudication an agreed case, upon the following state of facts, which they aver are real facts, and that the matters in controversy between them constitute a real controversy, to wit: The defendant, George L. Maloney, at

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the regular August elections for the county of Knox, in the year 1888, was elected County Judge of Knox County, under the Act of the Legislature of 1887, Chapter 148, page 258, and was duly commissioned and qualified, under the provisions of said Act, to fill said office of County Judge of Knox County, agreeably to the Constitution and laws, during the term, with all the powers, privileges, and emoluments thereunto appertaining by law; and, for the term of four years from that time, has occupied said office.

"At the regular August elections for said county in the present year (1892), the relator, T. A. Rambo, offered himself as a candidate for said office, had no opposition, and received all the votes cast in said election for said office, and was declared by the officer holding said election duly elected thereto; and, in pursuance thereof, received his commission from the Governor, and has qualified as such County Judge, under said statute; and, on the first Monday in September after said election, and after his commission and qualification as aforesaid, he applied to the defendant, George L. Maloney, to be inducted into said office, and demanded of him the books, records, and papers of said office, which demand the said George L. Maloney refused, and he continues to hold said office and the possession of said books, records, and papers, insisting that he is entitled to hold said office under his said election, and under the Constitution of the State, for a term of eight years from the date

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thereof, or of four years from the first Monday of September, 1892.

"During his occupancy of said office, the said Maloney has performed the duties imposed upon him as such County Judge, by the Act above referred to, and has received the salary therein provided and allowed, the same having been paid by said county, as directed by said statute. In addition thereto, the said Maloney has been acting as a Turnpike Commissioner for Knox County, under the provision of § 1491 of Milliken & Vertrees' Code of Tennessee, and subsequent sections, and, for such services, has received from said county, in addition to the salary above named as County Judge, a salary of \$100 for the term of one year, and \$150 per annum for two years.

"He has likewise, during his term of office as such County Judge, been acting as one of the Board of Commissioners of the work-house of Knox County, under Act of 1891, Chapter 123, and, for such services, has received from the County Trustee of said county, in addition to the salaries above mentioned, the sum of \$50.

"Since he has been acting as such County Judge, he has investigated the accounts of former Trustees of Knox County, and discovered a default of two of said Trustees, or a discrepancy in their settlements, upon which there was found due to said county the sum of about \$33,000, which has been partly recovered and paid into the county treasury, and the rest secured. For his services in this re-

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gard, he was allowed and paid by the County Court, in addition to all sums hereinbefore mentioned, the sum of \$600, which was the amount of the commission that said Trustees would have received had they settled without defalcation.

“During his said term of office, he also acted, under appointment of said County Court, as a commissioner or a member of a building committee to build a new jail for said county, for which service he was paid by said county the sum of \$250. Also during his said term of office, and before the passage of the work-house Act of 1891, Chapter 123, he acted as a member of a committee appointed by said Court to superintend the work-house of said county, for which service he was paid by said county \$300 for two years’ service.

“Upon these facts the parties to this agreed case pray your Honor to adjudge whether the said George L. Maloney is entitled to retain and hold said office for the full term of eight years from the date of his said election, as he now contends, or until the next regular election for judicial officers of the State of Tennessee, two years hence, or for any time beyond the first day of September, 1892, and the commissioning and qualification of his successor; and, if not, that your Honor adjudge his removal from office, and that the relator herein be inducted into said office as his duly qualified successor thereto. And also that your Honor will adjudge all questions of law legitimately arising out of the facts of this case,

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as hereinbefore stated, and grant all such relief to the plaintiff and relator herein as he shall be justly entitled to in your Honor's Court upon the facts of this case."

Upon the foregoing facts the Court adjudged and decreed that "the respondent, G. L. Maloney, is entitled to hold the office of County Judge of Knox County for the constitutional term of eight years (8 years) from the date of his commission, and that the application of the relator to be inducted into said office must be denied."

From that decree the relator has appealed.

Generally the counties of this State have no County Judges. Where they exist, it is by virtue of special statutes.

The office of County Judge of Knox County was created by Chapter 148 of the Acts of 1887. By the first section of the Act the term of the office was expressly limited to four years. If that limitation be valid, the term of Maloney has expired, and Rambo is entitled to the office. How that is, depends upon certain provisions of the organic law. Sections 1, 2, and 3 of Article VI. of the Constitution of 1870, so far as relating to this question, are in the following words:

"SECTION 1. The judicial power of this State shall be vested in one Supreme Court, and in such Circuit, Chancery, and other inferior Courts as the Legislature shall, from time to time, ordain and establish, in the Judges thereof, and in Justices of the Peace. * * *

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"SEC. 3. The Judges of the Supreme Court shall be elected by the qualified voters of the State. * * * Every Judge of the Supreme Court shall be thirty-five years of age, and shall, before his election, have been a resident of the State for five years. His term of service shall be eight years.

"SEC. 4. The Judges of the Circuit and Chancery Courts, and of other inferior Courts, shall be elected by the qualified voters of the district or circuit to which they are to be assigned. Every Judge of such Courts shall be thirty years of age. * * * His term of service shall be eight years."

A County Judge is a Judge of one of the "inferior Courts" contemplated by those provisions of the Constitution. That construction is so well-settled that no discussion of the question is necessary in this case. *State of Tennessee v. Glenn*, 7 Heis., 472; *State of Tennessee v. McKee*, 8 Lea, 24; *State of Tennessee v. Leonard*, 2 Pickle, 485.

It follows that "his term of service shall be eight years," and this is true though the Legislature, in creating the office, may have attempted to limit the term to a shorter period. In such a conflict, the Act being otherwise valid, the words of the Constitution must prevail, and those of the statute, to the extent of the antagonism, must be entirely disregarded as null and void. Such was the holding of the Court in the case last cited, at page 488.

The limitation of the term, by the first section

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of the Act under consideration, is, therefore, inoperative and void, and Maloney is entitled to hold his office without reference thereto, and just the same as if no such limitation had been incorporated in the statute.

Thus far it has been established that a County Judge is a judicial officer within the meaning of the Constitution, and that his term of service, like that of any other Judge, is eight years. Does it follow that Maloney's incumbency, beginning, as it did, September 1, 1888, may continue, without another election, until September 1, 1896, as adjudged by the Chancellor?

Clearly, it would have been so under the Constitution of 1834; for, by that instrument, the incumbent of a public office was entitled to hold and enjoy it for the full constitutional term, without regard to the time of the beginning of his incumbency, provided only that he had been legally elected and inducted into the office in the first instance. *Powers v. Hurst*, 2 Hum., 24; *Brewer v. Davis*, 9 Hum., 209; *Keys v. Mason*, 3 Sneed, 8.

The rule is different, however, under the Constitution of 1870. This is evident when Sections 3 and 4 of Article VI. are considered in connection with Section 5 of Article VII. The first two sections have already been quoted; the last one is as follows:

“ARTICLE VII., SECTION 5. Elections for judicial and other civil officers shall be held on the first Thursday in August, one thousand eight hundred

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and seventy, and forever thereafter on the first Thursday in August next preceding the expiration of their respective terms of service.

"The term of each officer so elected shall be computed from the first day of September next succeeding his election. The term of office of the Governor and other executive officers shall be computed from the fifteenth of January next after the election of the Governor. No appointment or election to fill a vacancy shall be made for a period extending beyond the unexpired term. Every officer shall hold his office until his successor is elected or appointed and qualified. No special election shall be held to fill a vacancy in the office of Judge or District Attorney, but at the time herein fixed for the biennial election of civil officers. And such vacancy shall be filled at the next biennial election occurring more than thirty days after the vacancy occurs."

By these provisions a new era in the political history of the State is established. A certain day is named, from which all official life thereafter shall be reckoned. Absolute uniformity in the time for the commencement and termination of every official term of officers of the same grade throughout the State is positively ordained. Though such uniformity had been of but small moment under the Constitution of 1834, it is now made paramount.

The beginning, duration, and ending of every judicial term are definitely fixed and made unalterable. The first term began September 1, 1870,

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continued eight years, and expired September 1, 1878. The second term began September 1, 1878, and expired September 1, 1886. The third term, during which the respondent, Maloney, was elected, began September 1, 1886, and will expire September 1, 1894. And thus are all terms to begin and end at intervals of eight years from September 1, 1870. No "term," as such, can begin or end otherwise. The Constitution, in effect, divides the future into periods of eight years, beginning with September 1, 1870, and calls each period a judicial term. Beyond the end of no one of those periods can any Judge hold without election for the next period.

The language, "no appointment or election to fill a vacancy shall be made for a period extending beyond the unexpired term," was introduced into the Constitution of 1870 to further insure uniformity in the official terms of officers of the same grade by affirmatively altering the rule existing under the Constitution of 1834.

It applies equally to cases where the appointment or election may be made to fill an office for the first time, and where it may be made to fill one whose previous incumbent has died, resigned, or been removed.

The word "vacancy" covers both cases. Bouvier says a vacancy is "a place which is empty;" and, further, that "the term is principally applied to cases where an office is not filled."

Webster defines it as "a place or post unfilled; an unoccupied office."

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There is a vacancy in every instance in which there is an office without an incumbent. Every office without an officer is vacant. Therefore, every new office created must of necessity be vacant from the time of its creation until it is filled by appointment or election.

The words, "unexpired term," as employed in the sentence just quoted, likewise have a twofold meaning and application. As applied to judicial offices, they signify the future portion of any particular period of eight years, computed from September 1, 1870, for which an appointment or election is to be made. They include the case in which the office to be filled is a new one, to be occupied for the first time, as well as that in which the office has been occupied before, and is made vacant by death, resignation, or removal.

Maloney was inducted into office at the end of the first quarter of the third judicial term under the Constitution of 1870, and is entitled to hold the office for the remainder of that term, which will end September 1, 1894.

The right of Maloney to receive and retain other compensation than the regular salary of his office cannot properly be adjudged in this case. That is a question in which the relator, Rambo, has no interest, and which therefore he cannot litigate.

For reasons herein stated, the suit is dismissed.

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CHATTANOOGA *v.* NORMAN.

(Knoxville. November 11, 1892.)

MUNICIPAL CORPORATIONS. *Validity of stock ordinance.*

A municipal corporation has power to prohibit, under suitable penalties, the running at large of stock within a specified portion, less than the whole, of its territory. Such ordinance is within the police power of the corporation. It is not invalid as vicious class legislation.

Cases cited and approved: Knoxville *v.* King, 7 Lea, 441; 96 U. S., 521; 97 Mass., 221.

FROM HAMILTON.

Appeal in error from Circuit Court of Hamilton County. JOHN A. MOON, J.

SPURLOCK & LATIMORE for Chattanooga.

CLIFT & SMITH for Norman.

SNODGRASS, J. An ordinance of the city of Chattanooga provides that:

"It is unlawful, and is hereby declared to be a nuisance, for any animal of the horse, mule, cattle, sheep, swine, or goat kind to be found running at large on the open lots, streets, alleys, lanes, or commons within the corporation, except the territory south of Montgomery Avenue, east of the

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East Tennessee, Virginia and Georgia Railroad track, and west of Cameron Hill."

Other ordinances, not necessary to quote, make it the duty of the pound-keeper to impound animals found running at large within this limit, and hold them until reclaimed by the owner, after payment of penalty and charges, and for sale in default thereof on due notice.

The defendant in error owned a cow, which was found running at large in that part of the city embraced in the ordinance, and the cow was taken and impounded pursuant thereto. He demanded possession of his cow, which was refused unless he would pay the prescribed penalty of one dollar and fifty cents for one day's feeding of the cow. This he declined to do, and brought this action of replevin, obtaining judgment. The city appealed in error, and the only question presented is as to the validity of the ordinance quoted.

The Circuit Judge makes the judgment show that it is "based on the fact that the cow ordinance does not include all of the corporation of the city of Chattanooga, but a certain portion, and is therefore null and void as class legislation."

If that view be correct, the judgment is sustained; otherwise, it is erroneous.

The power of the city, acting through its Board of Mayor and Aldermen, to pass an ordinance making unlawful, as a nuisance, the running at large of such animals as are described in the ordinance being considered, is clear. That it would

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fall within the general police power of a municipality is everywhere admitted, and is nowhere better settled than in this State. *Knoxville v. King, 7 Lea, 441.*

There is no doubt, therefore, that had the ordinance covered the whole city it would have been valid. The question is, Must it be invalid because it does not, and is it class legislation because of its limited application?

We hold it is not class legislation in any sense. It is not intended to benefit or burden anybody within or without the territory included. No one living in it is permitted to allow his stock to run at large there any more than one living without the limit. It applies to everybody, exempting none from its operation, and making no distinction as to stock, either as to residence or ownership. Had the ordinance provided that those living within the limits to which the ordinance applied should not have been required to observe it, or that only those living within the limit should have been required to observe it, it would have been open to the objection made against it, but the ordinance has no such feature. It is general in its application to all stock found running at large in the specified places within the prescribed territory, come whence and belong to whom it may. Nor can the fact that certain territory of the city does not fall within the limit prove that such territory was benefited or burdened by the non-inclusion. The ordinance simply does not af-

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fect it in fact, and cannot be held to injure or benefit it in law.

It remains, therefore, to inquire whether a city ordinance, passed under its police power, must apply not only to all the people of a city who may violate it, but must also cover all the territory of a city, and make every thing unlawful in *every* part of it which it may attempt to prohibit in *any*. If so, what becomes of ordinances establishing "fire limits," "laundry limits," "slaughter-house and powder-house limits," regulating speed of trains in certain corporate localities, providing for guards and gates at railroad crossings, and all the innumerable objects of special provision for particular purposes not essentially deserving or capable of other than special regulation? The same power which authorizes exclusion of slaughter-houses, etc., from a particular locality and location of them in another within the same city, or defines in what sections of a city all houses must be of brick, stone, or metal, declaring that elsewhere in the corporation they may be of wood, authorizes a municipality to say that the running of stock at large shall not be permitted in certain localities, while it makes no provision for others which it deems, for any reason, does not need or require such regulation.

It could not follow that, because the municipality might not prohibit stock in every quarter of its area, much of which might not be improved, or even laid off into streets and alleys, it

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must therefore permit it to browse at will in the yards of its public buildings, pasture its squares and parks, or defile the approaches to its schools and churches.

It is not meant by this to say that the area of Chattanooga not included in the "stock limit" is unimproved in whole or in part—the fact does not appear in this record—but the illustration, as a general one, is used to show how necessary may be such a prohibition in one part of a city and how unnecessary in another.

It will be borne in mind that such ordinances as the one under consideration do not make certain acts, done anywhere in a corporation, offenses, and then provide for punishment of only particular persons out of a number who may commit or permit the prohibited acts, or provide that certain acts or omissions are offenses everywhere within the corporate limits, but punishable only when committed at a particular place therein, but, on the contrary, they establish certain "limits"—as, "fire limits," "laundry limits," "slaughter-house limits," etc.—and make the doing of certain acts therein unlawful. The territory is limited, but the prohibition is general. It permits no one to do the acts prohibited within the limit. "Stock limits" fall strictly and properly within this classification. Indeed, it must be remembered that the stock law had its origin in a limit. The earlier acts and ordinances on that subject prohibited the running at large of certain kinds of stock in certain spec-

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ified places, as in streets and highways. It was never thought then that they were bad because they did not include all stock and in all places. So here there is a limit, even within the limited territory. No one is prohibited from keeping the stock described in the ordinance or letting it run in any inclosure. It is only a prohibition against running at large in certain places, designated as streets, alleys, etc.

So much by way of general statement and discussion of the question. Coming now to the authorities, it is clearly established and sustained.

The police power of a State, or a municipality as an arm of the State, extends to the making of such laws and ordinances as are necessary to secure the safety, health, good order, peace, comfort, protection, and convenience of the State or municipality. It not only permits passage of general laws for the entire State or municipality, but special ones, applicable to particular localities, highways, rivers, streets, and limits of a territory or a city; and, of these and the necessity for local application, the law-making power is the judge; and, if not in violation of a fundamental law, or unreasonable, are everywhere upheld. Cooley on Const. Lim., Ch. XVI., and cases cited. See, also, *Ibid.*, 246, 247, and cases cited (5th Ed.); Am. and Eng. Ency. of Law, Vol. XV., page 1170; Vol. XVII., pages 248 to 255; Vol. XVIII., pages 747, 748, and cases cited; *Railroad Co. v. Richmond*, 96 U. S., 521 (Lawyers' Co-op. Ed., Book 24, page 734).

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The cases cited cover all classes of general and limiting ordinances, and maintain the doctrine here announced to the fullest extent. In the last case, the Supreme Court of the United States says: "All laws should be general in their application, but all places within the same city do not necessarily require the same local regulation." The question being considered was an ordinance prohibiting a particular railroad company, by name, from using engines on a particular street, designated by name, of the city of Richmond. The ordinance was upheld, the Court saying further: "While locomotives may, with great propriety, be excluded from one street, or even from one part of a street, it would sometimes be unreasonable to exclude them from all. It is the special duty of the city authorities to make the necessary discrimination in this particular."

In answer to the objection that the particular railroad company was alone named in the ordinance, and that it was therefore special and invalid, the Court said: "No other person or corporation has the right to run locomotives in Broad Street. Consequently, no other person is or can be in like situation, except with the consent of the city. On this account, the ordinance, while apparently limited in its operation, is, in effect, general, for it applies to all who can do what is prohibited. Other railroad companies may occupy other streets, and use locomotives there, but other streets may not be situated like Broad Street;

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neither may there be the same reasons why steam transportation should be excluded from them."

Then follows the first quotation we made from the case, as to general law and application only in particular locality.

This case is a very advanced one, because it not only upheld an ordinance for the exclusion of a nuisance from a particular street, but named the party forbidden to commit it. The general exclusion of engines or of stock from particular streets or localities falls far short of this in the terms in which they are enacted, but this was upheld as falling within, although it seemed to go beyond, the principle.

The error of a contrary conclusion is based upon the idea that there is some inequality, because the ordinance applies only in a particular locality; but this is most tersely and definitely answered by a Massachusetts case, quoted in citations heretofore referred to, that such an ordinance "is not unequal, because it applies to all persons doing the forbidden act within the territory designated, whether inhabitants of that locality or not."

Commonwealth v. Patch, 97 Mass., 221.

We hold, therefore, that the ordinance in question is valid, and the judgment in this case is erroneous. It is reversed, and judgment will be entered here in favor of the city, and for all costs.

State *v.* Paint Rock Coal, etc., Co.

STATE *v.* PAINT ROCK COAL, ETC., CO.

(Knoxville. November 18, 1892.)

CONSTITUTIONAL LAW. *Statute void as authorizing imprisonment for debt.*

A statute is unconstitutional as "authorizing imprisonment for debt in civil cases" which declares it a misdemeanor punishable by fine for any person to refuse to cash or redeem in lawful currency his check or scrip when presented within thirty days after its issuance.

Constitution construed: Art. I., Sec. 18.

Acts construed: Acts 1887, Ch. 209.

FROM SCOTT.

Appeal in error from Circuit Court of Scott County. S. A. ROGERS, J.

Attorney-general PICKLE for State.

WASHBURN & TEMPLETON for Company.

W. A. HENDERSON, Sp. J. At the July term, 1891, the grand jurors for Scott County returned an indictment against the Paint Rock Coal and Coke Company, consisting of two counts, in substance as follows:

First.—That the said defendant refused "to cash a certain check of its own that was presented it within thirty days of its date of issuance."

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Second.—That the said defendant “did unlawfully refuse to redeem, in lawful currency, a certain check of its own which said Paint Rock Coal and Coke Company had issued.”

To this indictment the defendant interposed a motion to quash, and set forth the following grounds:

First.—Because no criminal offense is alleged in the indictment.

Second.—Because the Act of 1887, under which this indictment was drawn, is unconstitutional, in that it impairs the obligation of the contract, and attempts to imprison the defendant for refusing to pay a debt.

On the hearing of the questions thus presented, his Honor, the Circuit Judge, sustained said motion and quashed said indictment. The State appeals to this Court.

Passing over the objections to the form of the indictment, which contains no identification or description of the check complained of, the law of the case is involved in the second ground of the motion to quash.

The Act of March 29, 1887, enacts that from and after the passage of that Act it would be unlawful for any person or persons, firms or corporations or companies, to refuse to cash any checks or scrip of their own that may be presented them within thirty days of its date of issuance, and that any such person who should refuse to redeem, in lawful currency, any such

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checks or scrip would be guilty of a misdemeanor, and, upon conviction, should be fined not less than ten nor more than twenty-five dollars for each offense. In other words, that when any person who owed a debt which was evidenced by check or scrip issued by him, did not cash the same within thirty days of its issuance, he would be guilty of a misdemeanor, and fined accordingly, which judgment, of course, under the general law, would be liable to be enforced by confinement in the work-house.

The question is whether or not that Act is violative of the fundamental law of the land. If this statute, and the indictment under it, can be maintained, any citizen, corporation, or company drawing a check or giving a written order, in good faith, in favor of any person, and failing, for any reason, to pay the same, or to redeem it in currency, if presented in thirty days, is guilty of a crime for which he may be punished by imprisonment.

Section 18 of Article I. of the Constitution of this State provides: "The Legislature shall pass no law authorizing imprisonment for debt in civil cases." The Act of the Legislature in question, while not directly authorizing imprisonment for debt, does attempt to create a crime for the non-payment of debts evidenced by check, scrip, or order, and for such crime provides a penalty, which may or may not be followed by imprisonment. In that way and for that reason the Act

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is violative of the spirit if not the letter of the constitutional provision above cited. It is an indirect imposition of imprisonment for the non-payment of debt, and is, therefore, clearly within the constitutional inhibition.

Affirm the judgment.

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(Knoxville. November 18, 1892.)

1. COURTS. *Legislature has power to establish special Courts.*

Doctrine re-affirmed that the Legislature has power to create and establish special Courts. (*Post, pp. 88-92.*)

Constitution construed: Art. VI., Sec. 1.

Cases cited and approved: *Moore v. State*, 5 Sneed, 512; *Wilcox v. State*, 3 Heis., 114.

2. SAME. *Same. Not a removal of the seat of justice.*

And a statute establishing a special Law Court for five of the seventeen civil districts of a county, to be held at a place other than the county seat of such county, is not in conflict with that clause of the Constitution which forbids the removal of "the seat of justice of any county * * * without the concurrence of two-thirds of the qualified voters of the county." The establishment of such special Court does not operate to remove "the seat of justice" of the county. (*Post, pp. 89-97.*)

Constitution construed: Art. X., Sec. 4.

Act construed: Acts 1891, Ch. 26.

Cases cited: *Stuart v. Baer*, 8 Bax., 141; *Cole Mfg. Co. v. Falls*, 90 Tenn., 469.

3. SAME. *Same. Same.*

And a provision in such statute that where such special Court has jurisdiction of the cause of action, it may issue counterpart writs for joint defendants residing in the county, but outside the Court's territorial jurisdiction, does not affect the question of the constitutionality of the statute. (*Post, pp. 95, 96.*)

4. JURY. *Selection from part of county.*

The provision in a statute establishing a special Court for part of a county, requiring jurors, grand and petit, to be selected for that Court from that portion of the county alone embraced within the

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jurisdiction of the Court, is not in conflict with the constitutional guaranty to the accused of a "speedy public trial by an impartial jury of the county." (*Post*, pp. 97, 98.)

Constitution construed: Art. I., Sec. 9.

Act construed: Acts 1891, Ch. 26, Sec. 5.

5. SAME. *Objections to grand jury too late, when.*

Objection that grand jury were selected from residents of part only of the county, if tenable at all, comes too late when made for first time by motion in arrest of judgment. (*Post*, p. 98.)

Cases cited and approved: *State v. Cole*, 9 Hum., 626; *McTigue v. State*, 4 Bax., 314; *Turner v. State*, 89 Tenn., 559.

6. SAME. *Proper practice when incompetent jurors are discharged before jury are sworn.*

Upon trial of murder case, after eight jurors had been selected, it was discovered that two of that number had expressed opinions adverse to defendant, and were therefore incompetent. These two jurors, after full investigation, were discharged. Defendant's counsel then moved the discharge of the other six jurors, they having associated with the two incompetent ones. The Court re-examined the six jurors, and, finding that they had not been contaminated by their association with the two, refused to discharge them.

Held: The Court's refusal to discharge the six jurors was correct. (*Post*, pp. 99, 100.)

Cases cited and approved: *Taylor v. State*, 11 Lea, 720; *Boyd v. State*, 14 Lea, 169.

7. SAME. *Disqualification of, after verdict. Examples.*

After verdict in murder case, two of the jurors were attacked by evidence tending to show that they entertained opinions adverse to defendant when taken on the jury. Each juror was proven by three witnesses to have expressed opinions that defendant was guilty. Both jurors deny the statements of the attacking witnesses, and prove for themselves good character. Both jurors deny any knowledge of the facts of the case prior to going on jury. There is no proof that they knew or had heard the facts of the case. Their statements to attacking witnesses did not indicate that they had heard or known the facts. The trial Judge refused new trial upon this evidence.

Held: This Court will not overrule the action of the Circuit Judge upon this point. (*Post*, pp. 100-105.)

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Cases cited and approved: Mann *v.* State, 3 Head, 373; Rader *v.* State, 5 Lea, 613; Spence *v.* State, 15 Lea, 547; Johnson *v.* State, 11 Lea, 49.

8. EVIDENCE. *Communications to an attorney not privileged, when.*

An attorney at law who is not attorney for the defendant in a criminal case, is competent to prove the defendant's confessions of the crime, made in his presence, although he may have been spoken to, but not employed, for the defense. (*Post*, pp. 105, 106.)

9. SAME. *Erroneous exclusion cured by subsequent admission of the evidence.*

If, after evidence has been erroneously excluded, it is subsequently admitted, there is no reversible error in the exclusion. (*Post*, pp. 106, 107.)

FROM ROANE.

Appeal in error from Circuit Court of Roane County. S. A. ROGERS, J.

L. A. GRATZ and YOUNG & YOUNG for Ellis.

Attorney-general PICKLE, W. L. WELCKER, and T. A. WRIGHT for State.

T. S. WEBB, Sp. J. Plaintiff in error was indicted in the Law Court of Rockwood for the murder of a woman named Mollie Scott, alias Mollie Reed. At the April term, 1892, of said Court he was convicted of murder in the first degree, with mitigating circumstances, and was sentenced to imprisonment for life in the penitentiary. He filed

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motions for a new trial and in arrest of judgment, which were overruled, and he has appealed.

In the Court below the prisoner filed a special plea in abatement, averring that the Law Court of Rockwood had no jurisdiction to try him upon the indictment, for the following reasons:

First.—Because the county seat of Roane County, Tennessee, being the county in which it is charged the offense was committed, is the town of Kingston, while he is arraigned and charged, and is about to be tried, in the town of Rockwood, in said county, in a Court called in the indictment "Law Court of Rockwood."

Second.—Because the Act of the Legislature (Chapter 26 of the Acts of 1891) establishing said Law Court of Rockwood, and giving to it exclusive jurisdiction for the trial of offenses committed in the sixth, seventh, eleventh, twelfth, and thirteenth districts of Roane County, is unconstitutional and void, and confers no jurisdiction upon said Court.

The Attorney-general demurred to this plea, and the demurrer was sustained and the plea overruled, and the prisoner put upon his trial on the plea of not guilty. The demurrer is not copied into the transcript, but the judgment of the Court sustaining the same adjudges "that the Act of the Legislature establishing the Law Court of Rockwood is constitutional."

The reasons in arrest of judgment renew the objections to the jurisdiction, as made in the plea,

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viz.: That the Court was held away from the county seat, and that the Act of 1891 was unconstitutional and void; and, in addition thereto, claim (1) that the jurors who tried the case were drawn from the sixth, seventh, eleventh, twelfth, and thirteenth civil districts alone of Roane County, and no other jurors from any other districts were presented to the defendant, although the county is composed of seventeen districts, whereas the prisoner was entitled to be tried by a jury "taken from the body of the county;" and (2) that the grand jurors finding the indictment were selected from said five districts of Roane County, and were "sworn, charged, and impaneled" at a place called Rockwood, which was not the county seat.

Whether or not these objections made in the plea, and in the reasons in arrest of judgment, are valid, depends upon whether or not the Act of 1891, establishing the Law Court of Rockwood, is unconstitutional and void. If that Act is unconstitutional and void, then the prisoner has been tried, convicted, and sentenced by a tribunal having no legal existence. If that Act is constitutional and valid, then said objections are invalid, and furnish no grounds for arresting or reversing the judgment, and we will then be at liberty to consider the other questions relied upon by counsel, but not yet stated in this opinion.

The Act in question was approved January 27, 1891, and is as follows:

"SECTION 1. That there shall be held at Rock-

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wood a Common Law Court for the sixth, seventh, eleventh, twelfth, and thirteenth civil districts of Roane County, to be called the 'Law Court of Rockwood,' and to constitute one of the Courts of the Third Judicial Circuit, and to be held by the Judge thereof, with common law jurisdiction, original and appellate, over all cases arising at law within said civil districts of a civil, commercial, or criminal nature, and that the Attorney-general of said third circuit shall attend said Court and transact the business appertaining to his office thereat.

"SEC. 2. That the Law Court of Rockwood has general common law jurisdiction, original and appellate, in all cases at law of a civil or criminal nature, arising in the civil district named in the first section of this Act, and that no resident of said district shall be sued in the Circuit Court of Roane County, Tennessee, in any transitory action, and only in such cases as he might be sued in said Circuit Court if he were a resident of any other county or State, nor to be presented or indicted therein unless the offense was committed in the county outside of the districts named in the first section of this Act. When the Court hereby established has jurisdiction of the cause of action, counterparts of writs may issue from said Court for joint defendants residing out of said districts, as are issued by the Circuit Court of the State to other counties, and counterparts may issue to any other counties in the State as in Circuit Courts.

"SEC. 3. That the Law Court of Rockwood

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shall have all the power and jurisdiction, within the local jurisdiction named in the first section of this Act, that belongs by law to the Circuit Courts of this State.

"SEC. 4. That the Judge of said Court shall, at each term thereof, order the impaneling of a grand jury, which shall have the same powers, within the limits of said civil districts, and be governed by the same laws, as other grand juries are.

"SEC. 5. That the County Court of Roane County shall designate, and cause to be summoned by the Sheriff or his deputy, a sufficient number of the resident citizens of the civil districts named in the first section of this Act to serve as jurors in said Court; *Provided*, The jurors for the first term of said Court, to be holden on the third Monday in April, 1891, shall be designated by said County Court at its April term, 1891."

Section 6 provides for the transfer of certain causes from the Circuit Court to the Court at Rockwood.

Section 7 requires the Sheriff to appoint one or more deputies, who shall reside within the local jurisdiction of the Rockwood Court.

Section 8 makes the Clerk of the Circuit Court the Clerk also of said Rockwood Court.

Section 9 provides that the expenses of the Rockwood Court shall be paid out of the treasury of the county, as the expenses of the Circuit Court are paid.

Section 10 fixes the times for holding the Rockwood Court.

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Section 11 provides that the Act shall take effect from its passage.

The counsel for the prisoner contends that this Act is in violation of Section 4 of Article X. of the Constitution of the State. That part of said section which is claimed to be violated by the Act is as follows: "Nor shall the seat of justice of any county be removed without the concurrence of two-thirds of the qualified voters of the county."

The power of the Legislature to establish special Courts, under Section 1 of Article VI. of the Constitution, is well established, and is not denied in this case. *Moore v. The State*, 5 Sneed, 512; *Wilcox v. The State*, 3 Heis., 114.

But, while conceding the general power to establish special Courts, the contention is, that the Legislature has no power to establish a special Court at any other place in a county than the county seat; and, that the establishment of such a Court by the Legislature at a place other than the county seat, is to remove the "seat of justice" "without the concurrence of two-thirds of the qualified voters of the county."

The Act of 1891, which we are considering, does establish the Law Court of Rockwood at the town of Rockwood, while the county seat is at Kingston.

The question, then, is squarely presented, whether an Act of the Legislature, establishing a new Court at a point other than the county seat, is a

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removal of the seat of justice. If the Act has this effect, either directly or indirectly, then it is plainly in violation of the Constitution, and it will be our duty to declare it void, as was done in the case of *Stuart v. Baer*, 8 Bax., 141-146.

Our decision must be arrived at by construing the Act of 1891. In the case of *Cole Mfg. Co. v. Falls*, 6 Pickle, 469, this Court announced the rule "that all intendments are in favor of the constitutionality of an Act of the Legislature, passed with the forms and ceremonies requisite to give it the force of law; and that, where one construction will make a statute void on account of conflict with the Constitution, and another would render it valid, the latter will be adopted by the Courts, even though the former, at first view, be otherwise the more natural interpretation of the language used. Every reasonable doubt must be solved in favor of the legislative action."

The "seat of justice," within the meaning of the Constitution, is what is commonly called "the county seat." It is the place where the court-house and the jail and the county offices are located; the place where the Chancery and Circuit and County Courts are held, and where the county records are kept. The seat of justice is located with reference to the convenience of the citizens of the county. After it is located, the County Court is required by law to erect "a court-house, jail, and other necessary county buildings." Code, § 408.

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The money to purchase the land and erect the buildings is raised by taxation. The citizens of the county pay the taxes. The land and buildings cost a large sum of money. The buildings are modeled and constructed with a view to the purposes for which they are to be used, and are not adapted to other purposes. A removal of the seat of justice would leave this property, for which the citizens of the county have paid in taxes, on the hands of the county, to be held at a total loss, or sold at a great sacrifice; and the citizens must be immediately taxed for the purpose of building a new court-house and jail and other county buildings at the new county seat. Moreover, the county seat might be removed to a point very inconvenient of access to a majority of the citizens. Thus, any arbitrary removal of the county seat might subject the citizens of the county to both pecuniary loss and great inconvenience. To prevent these hardships, the Constitution has expressly provided that county seats shall not be removed without the concurrence of two-thirds of the qualified voters of the county.

The Act of 1891, establishing the Law Court of Rockwood does not attempt to remove the seat of justice from Kingston to Rockwood. The court-house, jail, and other county buildings are left at Kingston. All the county offices are left there. The existing Courts are to be held there just as before the Act. The seat of justice is left just where it was and just as it was. The county is

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not burdened with any pecuniary loss. But the Act requires that the county shall bear the expenses of holding the Rockwood Court, and it is claimed that this is an additional burden imposed upon the county without its consent. This claim is true; but it would be equally true if the new Court had been established at Kingston instead of Rockwood. In that case, it might have been necessary for the county to enlarge its court-house, or build a new one, for the new Court, and yet the county could not object to the Act on that account. Section 1 of Article VI. of the Constitution confers upon the Legislature the power to establish such special Courts, and the Legislature is the sole judge of the necessity or expediency of establishing such Courts.

It thus appears that the citizens of the county are not subjected to any pecuniary loss by said Act; and we will now consider whether the citizens are subjected to any such inconvenience as the Constitution intended to guard against. It is certain that no inconvenience accrues to those citizens residing within the territorial jurisdiction of the new Court. On the contrary, their convenience is greatly increased by having a Court brought within easier reach of them. It is equally clear that those citizens of the county residing outside of the territorial jurisdiction of the Rockwood Court are not subjected to the inconvenience intended to be guarded against.

It is claimed that such inconvenience to said

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outside citizens is created by the second section of the Act. That part of said section on which the claim is based, is as follows:

"When the Court hereby established has jurisdiction of the cause of action, counterparts of writs may issue from said Court for joint defendants residing out of said districts, as are issued by the Circuit Court of the State to other counties, and counterparts may issue to any other counties in the State as in Circuit Courts."

The claim is that a citizen residing in a distant part of the county, outside of the sixth, seventh, eleventh, twelfth, and thirteenth districts, may be compelled to attend the Rockwood Court, when he is sued jointly with a resident of said districts, and served with a counterpart writ. So the same citizen may be compelled to go to a distant county when served with a counterpart writ. We think the inconvenience here complained of is not such as can affect the validity of the Act.

In further support of the views already expressed, we may add that the Magistrates' Courts are Courts established by the Legislature under the power conferred by the Constitution. The Justices of the Peace hold these Courts, away from the county seat, in the separate civil districts in which they reside. The judgments of these Courts, within the limits of their jurisdiction, are just as valid and binding as the judgments of any other Court, unless appealed from. It cannot be contended that the seat of justice is removed to a particular civil

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district, because the Justice of the Peace holds his Court in that district, instead of at the county seat.

Our conclusion is that the Act of January 27, 1891, establishing the Law Court of Rockwood does not purport to remove the seat of justice of Roane County from Kingston to Rockwood, and is not obnoxious to that part of Section 4 of Article X. of the Constitution quoted above.

Whether or not it is good policy to establish such Courts is a question for the Legislature. We only pass on the question of the constitutional power of the Legislature. It determines its own policy.

It is next insisted that the fifth section of said Act is unconstitutional, because that section requires the jurors for the Rockwood Court to be taken from the resident citizens of the sixth, seventh, eleventh, twelfth, and thirteenth civil districts of the county, instead of from the citizens of the whole county, or, as counsel says, from "the body of the county."

Section 9 of Article I. of the Constitution provides that, in prosecutions by indictment or presentment, the accused has the right to have a "speedy public trial by an impartial jury of the county."

If the jury is made up of citizens of any part of the county, who are otherwise qualified, the requirement of the Constitution is complied with. The common impression that the jury must come from the entire county is derived from the Code,

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§ 3985, which requires that one of the jurors designated for the Circuit Court "shall reside in each civil district into which the county is divided, and where the number of districts and the number of jurors do not coincide, the selection should be made with as much equality as possible. But § 3987 provides that "no mistake or omission, however, in complying with the above provisions in regard to the residence of the jurors designated shall amount to a disqualification." The Code provision thus appears, by its own terms, to be directory merely; and, if this were not so, still the Code is no more than an Act of the Legislature, and is subject to be amended or repealed by subsequent Acts.

It is next insisted that the indictment was found by a grand jury selected from the sixth, seventh, eleventh, twelfth, and thirteenth districts, and not from the entire county. The Act itself does not require the grand jurors to be taken exclusively from these five districts, but the objection of counsel is to the *fact* that they were so taken. This fact does not appear in the record, except that it is asserted in the reasons in arrest of judgment. If there was any thing in the objection, it should have been made *in limine*, and comes too late after the plea of not guilty and verdict upon that issue. *State v. Cole*, 9 Hum., 626; *McTigue v. State*, 4 Bax., 314; *Turner v. State*, 5 Pickle, 559.

But, if in time, there is nothing in the objec-

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tion, for the reasons shown in discussing the objections to the trial jury.

When the jury was being impaneled, and eight jurors had been accepted, the Attorney-general stated that he had reliable information that two of said eight jurors had expressed an opinion as to the guilt of the defendant before they were taken upon the jury. The Court heard evidence on the point, and found the charge to be true, and discharged the two disqualified jurors. The prisoner's counsel promptly demanded that the other six jurors be discharged, upon the ground that they had been associated with the two discharged jurors for a day and night, and had been tainted by the influence of their opinion. The demand was refused by the Court. It does not appear affirmatively that the six remaining jurors were influenced by the opinions of the two discharged, or that such opinions were made known to them. On the other hand, it does appear that the Court again interrogated the six remaining jurors, touching their qualification, and each one answered the various questions propounded by the Court, and showed that they were all competent, and had not been tainted.

In *Taylor v. The State*, 11 Lea, 720, Judge Cooper said: "Upon principle, in the absence of any thing else, the mere association of selected jurors with one of their number who had formed and expressed an opinion as to the guilt of the defendant, would no more render them incom-

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petent than such association previous to the trial."

In that case, it is true, the defendant made no motion to discharge the remaining jurors; but we think the principle above stated is correct.

In *Boyd v. The State*, 14 Lea, 169, it was held that "no presumption of improper communications will arise, but the burden is upon defendant to show any impropriety, if imputed to them."

We think this doctrine is sound, and we fail to see how mere association with the two discharged jurors would contaminate the remaining six, especially in view of the fact that these six were subsequently interrogated, and showed affirmatively that they had not been contaminated.

On his motion for a new trial, the prisoner produced affidavits to show that two of the jurors who rendered the verdict against him had formed and expressed the opinion that he was guilty before they were taken upon the jury; and this was not known to the prisoner until after the jury had been sworn and a part of the evidence had been given to the jury.

The Constitution guarantees to the accused a trial by an "impartial" jury. If any one of the jurors is not impartial, the verdict must be set aside.

One of the jurors attacked is I. N. Derrick. When put upon his *voir dire*, he qualified as competent.

The affidavit of J. L. Taylor states that, some

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time before the trial, he and Derrick were talking about the Ellis case, "and Derrick was relating over the facts of the case. Among other things, he said that Ellis held the woman by the hand while he shot her, and kept shooting her until she died. He was talking about the cruelty of the defendant to the woman, and said he thought he ought to be hung if he did that."

The affidavit of J. N. Hill states that he said to Derrick, some time before the trial, that he (affiant) had no doubt defendant was guilty, "and Derrick said the defendant was guilty, but he did not say of what degree of crime."

The affidavit of C. L. Haga states that, some time before the trial, affiant and Derrick were talking about the difficulty of securing a jury, and affiant said if he was on a jury like that, he would hang the man for killing a woman. Derrick said, "I would too." "There was more said on the subject, but affiant cannot recollect exactly."

Derrick's affidavit is filed, and he denies substantially all the statements made in the affidavits of Taylor, Haga, and Hill, and swears that, until he heard it on the trial, he had never heard any one who claimed to know the facts state them, and had never heard that defendant held the woman by the hand and shot her; and that he told the Court, when interrogated, that he had an impression made upon his mind by rumor, but he felt that he could disregard that impression and be governed by the law and the evidence. Derrick's

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affidavit is supported by the affidavit of seven men, who swear that Derrick's character is good, and they do not believe he would go into the jury-box and try a cause upon any thing except the law and the evidence. It is not shown in any of the impeaching affidavits that Derrick claimed to know the facts, or to have heard them stated by any one who professed to know them. Taylor's affidavit shows that Derrick said he thought Ellis "ought to be hung if he did *that*," showing his opinion was based on a hypothetical case. Haga's affidavit shows that "more was said on the subject," which he could not recollect. The part not recollected might have shown that Derrick was speaking of a hypothetical case, or that his opinion was based on rumor. Derrick's affidavit shows that he stated on his *voir dire* that he had an impression, which was based on rumor, and that he did not know the facts, and never heard them detailed by any person who professed to know them, and his veracity and character are sustained by the affidavits of seven disinterested witnesses. Upon this testimony, we are constrained to hold that the impartiality of the juror, Derrick, has not been successfully impeached.

The affidavits of David Taylor, W. H. Booth, and William Little were offered to impeach the impartiality of the juror, Nelson.

David Taylor's statement is that "he and Nelson talked about the case, and as to what they had heard about the facts in the case, and Nel-

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son said he ought to be penitentiaried, and he may have said for what length of time, but he does not remember that."

William Booth's statement is that Nelson said "he could not give him justice on the trial; he ought to be hung, and that he knew that the defendant could overpower a woman; that a man that could not govern himself about a woman, and then kill her, ought to be hung."

William Little says he heard Nelson say, about ten days before the trial: "If I am caught on that jury, I'll hang Sam Ellis."

Nelson's affidavit emphatically denies the statements of William Little and W. H. Booth, but says he may have had casual conversations about the case with David Taylor; denies that Taylor ever related the facts to him, or pretended to do so, and states that affiant has no recollection of ever expressing any opinion in the matter; that he had never heard any of the evidence before he heard it on the trial, and was absolutely ignorant of the facts in the case when he went into the jury-box.

This juror qualified twice on his *voir dire*—once when he was accepted, and again after the jury was made up, and before they were sworn, as a completed panel, to try the issues. Five witnesses swear that he is an honest, truthful man, and they are satisfied he would not corruptly go on a jury for an improper purpose; and they believe he would try the case honestly, according to the law and the evidence, as he understood it.

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The trial Judge was of the opinion that the impartiality of Nelson, as a juror, had not been successfully assailed.

If the opinions attributed to this juror by the three affiants, were actually expressed by him, and were based upon a knowledge of the facts, or upon a statement of the facts made to him by some person who did know, or professed to know them, then he was disqualified to sit as a juror in the case. To whom shall we give credit, the three affiants—Taylor, Booth, and Little—or Nelson and the five affiants who sustain his character? Nelson swears that he went into the jury-box entirely ignorant of the facts of the case, and heard the evidence for the first time on the trial. If this is true, and he had any opinion before that time, it must have been based on rumor. Taylor says he and Nelson were talking about what they had heard about the facts in the case, but does not say how they heard about them.

In the case of *Mann v. The State*, 3 Head, 373–376, the opinions alleged to have been expressed by the jurors were quite as strong as in this case. The Court said: “From the fact that he [the juror] was selected, he must be presumed competent. To overthrow this, a clear case must be made out against it. He was elected by the defendant, and he must show a stronger case against him after trial than would be necessary to set him aside before he was selected. All that appears in these affidavits is, that he expressed

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strong and decided opinions against the prisoner. That would not have disqualified him in the first instance, if they were formed from rumor. Our decisions are so numerous on this subject that the question in every aspect has been settled. * * * The three affidavits introduced against him only show simply that he did express an opinion against the prisoner, without stating the source from which it was derived, whether from having heard the witnesses or from the facts as reported. So all that is proved against him may be true, and yet he be competent, according to the rule on that subject. It may be that all the juror said in these loose and idle conversations was not recollected or stated in the affidavits."

This doctrine was expressly approved in the case of *Rader v. The State*, 5 Lea, 613, 614.

To the same effect is the case of *Johnson v. The State*, 11 Lea, 49, 50; and in that case stress is laid upon the fact that the juror is shown to be a man of good character. The doctrine is reasserted in the case of *Spence v. The State*, 15 Lea, 547, 548.

These cases make it clear that the Circuit Judge was not in error in refusing a new trial on the ground of the disqualification of the jurors, Derrick and Nelson.

It is next insisted that the trial Judge committed an error in admitting the evidence of the witness, L. T. Holland. The ground upon which this testimony was objected to was that the rela-

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tion of attorney and client existed between the defendant and the witness, and that the testimony of the witness would divulge confidential communications. It appears affirmatively that the witness was not the attorney of the defendant at the time of the communications alluded to, and has not been since. After the conversation deposed to by the witness, defendant's father asked the witness to stay over till the next day and defend his son if he should be arrested. Witness did not stay over, and has never represented the defendant. This evidence was properly admitted.

W. R. Haggard, one of the State's witnesses, was asked by defendant's attorney: "How many times have you been arrested charged with crime?" To this question the Attorney-general objected, upon the ground that the question implied a record, and none was produced. The objection was sustained. This action of the Court is now assigned as error.

Immediately after this ruling of the Court, defendant's attorney proceeded, without objection, to examine the witness about a number of offenses with which he had been charged, and he admitted that he had been accused of murder, and tried for it. He was also asked whether he had not been accused of shooting into a railway passenger train, and into a buggy in which a gentleman and lady were riding; and was asked about a fight he had with some of defendant's relatives; and was made to admit that he did not like any of

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the Ellis family. The object of the question ruled out was to throw discredit on the witness by showing that he had been charged with crime. This was fully shown in the subsequent examination, and the evidence ruled out was admitted without objection, so that the defendant had the full benefit of it, and cannot now complain of the ruling. The evidence in the case, which we discuss orally along with this opinion, well warranted the verdict of the jury.

The judgment and sentence will be affirmed.

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RAILROAD *v.* RUSSELL.

(*Knoxville.* November 18, 1892.)

1. RAILROADS. *Liability for damages to live-stock by moving trains.*

The Code provisions declaring the liability of railroads for injury to live-stock by moving trains are modified, if not superseded, by the provisions of Acts 1891, Chapter 101. Under the Code, railroads were *prima facie* liable for every injury to live-stock by their moving trains, but were permitted to exonerate themselves by affirmative proof of observance of all the prescribed statutory precautions. The condition of track as to fencing was not material. Under Acts 1891, Chapter 101, railroads are liable for injury to live-stock by their moving trains unless their track is inclosed by a lawful fence. The observance of statutory precautions does not protect company under this statute if track is unfenced. Railroads are protected from liability, under this Act, if their tracks are inclosed by a lawful fence.

Code construed: § 1298, Subsection 4 (M. & V.); § 1166, Subsection 4 (T. & S.).

Acts construed: Acts 1891, Ch. 101.

Cases cited and approved: Railroads *v.* Crider, 91 Tenn., 489; Railroads *v.* Sadler, *Id.*, 508.

2. SAME. *Same. Evidence as to observance of precautions properly excluded.*

And therefore in a suit, brought since the passage of the Act of 1891, to enforce liability of railroad company for injury to live-stock by its moving trains upon an unfenced track, evidence tending to show observance of statutory precautions, is irrelevant and properly excluded.

3. SAME. *Same. Appraisement under Act of 1891.*

The appraisement, of value of live-stock injured by moving train on unfenced railroad tracks, provided by Acts 1891, Chapter 101, is not made a condition precedent to railroad company's liability. The owner of the live-stock may, at his option, proceed by appraisement and suit, or by suit without appraisement. If he proceeds without

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appraisement, he cannot recover his attorney fees, but only the actual damage sustained.

Act construed: Acts 1891, Ch. 101.

FROM ROANE.

Appeal in error from Circuit Court of Roane County. S. A. ROGERS, J.

LEWIS SHEPHERD and WELCKER & McNUTT for Railroad.

WRIGHT & WRIGHT for Russell.

CALDWELL, J. This is an action of damages, brought by W. H. Russell against the Cincinnati, New Orleans & Texas Pacific Railway Company, for killing a bull. The suit was commenced before a Justice of the Peace, from whose judgment the railway company appealed to the Circuit Court. In the latter Court, verdict and judgment were rendered in Russell's favor for \$40, and the railway company appealed in error to this Court.

On the trial, witnesses were examined as to the condition of the defendant's track *with reference to fencing*, and as to the killing and value of the bull, *no previous appraisement having been made*.

The trial Judge, conceiving the case to be controlled by Chapter 101 of the Acts of 1891, re-

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fused to admit evidence as to the observance or non-observance of the precautions prescribed by Sub-section 4 of § 1298 of the Code (M. & V.), and instructed the jury, among other things, substantially as follows: (1) That if the plaintiff's bull was killed by the moving train of the defendant upon an *unfenced track*, the plaintiff *was entitled to a recovery*; and (2) that if the animal was so killed upon a *fenced track*, the plaintiff *was not entitled to a recovery*.

Error is assigned upon the ruling as to evidence and upon the charge.

Confessedly, both are in conformity with Sections 2 and 3 of Chapter 101, Acts of 1891; but counsel for appellant deny that this case comes within the provisions of that Act. The contention is that this case should have been tried under §§ 1298, 1299, and 1300 of the Code, because the plaintiff did not have his bull *appraised* before suit, and then sue upon the *appraisement*, as authorized by sections four and five of the said Act of 1891. In other words, the insistence is that the said Act created a new remedy without affecting the old one; that said Act is to be treated as a whole, and that the provisions of sections two and three cannot be made available, unless those of sections four and five be first pursued.

To that view we cannot agree. The object of the Act in question was to induce railroad companies to *fence their tracks*, primarily in the interest of the traveling public, and, secondarily, for the

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protection of live-stock along the line of travel. It greatly modifies, and in a large measure supersedes, the previously existing law, which had no reference to the fenced or unfenced condition of railroads. *Illinois Central Railroad Company v. Crider*, 7 Pickle, 489 (19 S. W. R., 619 and 622).

The Act of 1891 makes no imperative requirement that railroad companies shall fence their tracks, but it holds out very potent and unmistakable inducements to that end. The second section makes railroad companies absolutely liable in damages for all live-stock killed or injured by moving trains upon *unfenced* tracks. *Ib.; Nashville, Chattanooga & St. Louis Railway Company v. Sadler*, 7 Pickle, 508 (S. W. R., 618). And section three gives them complete exoneration from liability where their tracks are *fenced*.

These are weighty inducements to the end sought by the Legislature—the one being in the nature of punishment for a failure to fence, and the other in the nature of a reward for fencing.

The burden cast upon railroad companies by the second section is absolute liability for the actual damage done. The owner may have the advantage of a *prima facie* case as to the amount of that damage, and of a recovery for reasonable attorney's fees, and thereby increase the burden upon the company in default by first having his damages appraised and then suing on the appraisement, as provided in sections four and five.

"Failure to fence is made conclusive evidence

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of negligence whenever live-stock is killed or injured upon such an unfenced road by moving engines or cars. The liability of the company for actual damages is made the consequence of the failure to fence, and if the offending company refuses to pay the *prima facie* value of such stock, as ascertained in the mode prescribed by the Act (Section 4), then it is made liable for an increase in damages to the extent of reasonable attorney's fee, in the event it shall unsuccessfully litigate its liability for such *prima facie* value." *Illinois Central Railroad Company v. Crider*, 7 Pickle 489 (19 S. W. R., 619, 620).

But the owner is not compelled to take the advantages allowed him by sections four and five of the Act. He may avail himself of them or not, as he sees fit, and yet enforce the liability established by section two. Nor can the defaulting railroad company avoid its liability under section two by showing that the owner has not taken steps to increase its burden as allowed by sections four and five.

The killing of live-stock upon an *unfenced track* by a moving train or engine fixes absolutely the liability of the defaulting company for the actual value of the stock killed; and that value may be recovered in an ordinary action of damages without previous appraisement, or the owner may have an appraisement, and if the appraised value is not paid in sixty days after presentation, he may sue for the same, and, if successful, recover that

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amount, and reasonable attorney's fees in addition.

To hold otherwise, would, in a large measure, defeat the object of the Act. If sections two and three can be made available only when there has been a previous appraisement, one party or the other may prevent their application in any case. The owner may not know of the killing of his stock in time to have the appraisement made. The notice prescribed by the first section may be impossible, or it may be intentionally withheld, and the owner may not otherwise learn of the killing until the dead body is buried or consumed. In such a case, without fault of the owner, no appraisement can be made; and, as a consequence, the railroad company, which, in disregard of the purpose of the Act, has failed to fence its track, escapes the liability prescribed in the second section.

On the other hand, the owner may know of the killing of his stock from the first, and may designedly fail to have an appraisement made, and, in that way, deprive the railroad company, which has met the legislative object by fencing its track, of the exemption afforded by the third section.

As a further result of the construction contended for by counsel of appellant, the owner would have two independent remedies—one under the old law and another under the new—to either of which he might resort if the track be not

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fenced, and the former of which he might pursue if the track be fenced; and the only sure escape for the railroad company would be through a compliance with both laws at the same time; with the old, by observing the precautions prescribed by subsection 4 of §1298 of the Code; and, with the new, by fencing its track, in obedience to the Act of 1891.

A construction with consequences so unequal and partial, will not be adopted in the absence of words indicating unmistakably that it was so intended by the Legislature.

The ruling upon evidence and the instruction upon the law of the case were correct.

Affirm with costs.

Marble Company v. Harvey.

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MARBLE COMPANY v. HARVEY.

(Knoxville. November 18, 1892.)

1. CORPORATIONS, PRIVATE. *Purchase of stock of other corporations invalid.*

A corporation cannot lawfully become the owner of shares in any other corporation "unless by power specifically granted by its charter or necessarily implied in it." The unauthorized purchase by one corporation of the shares of another corporation is *ultra vires* and void. No suit can be maintained by either party in furtherance or affirmation of such void contract, not even by a party who has fully executed the contract on his own part. Such illegal contract creates no estoppel upon either party.

Cases cited and approved: 131 U. S., 389; 139 U. S., 60.

Cited and distinguished: Barrow v. Turnpike Co., 9 Hum., 303; Heiskell v. Chickasaw Lodge, 87 Tenn., 668; 63 N. Y., 62; 96 U. S., 267, 312.

2. SAME. *Same. Case in judgment.*

The complainant company is a corporation organized under the laws of Ohio "for the purpose of cutting, dressing, manufacturing, selling, and disposing of marble, stone, slate, granite, and other substances, with such other incidental and necessary powers essential to carry on said business." It purchased of defendant, Harvey, twenty-five shares of the stock of the "McMillin Marble Company," a Tennessee corporation engaged in the marble business. Complainant paid the full consideration for these shares. Harvey transferred the shares to a trustee named by complainant, and for its benefit. As part of this contract, Harvey agreed to pay off one-half of certain liabilities existing against the "McMillin Marble Company." The complainant having been compelled to pay off these liabilities in full, brought this suit to recover back one-half the amount from Harvey.

Held: Complainant's contract with defendant for the purchase of the shares of the "McMillin Marble Company" is *ultra vires* and absolutely void, complainant's charter conferring upon it no power to make such purchase; and that this suit is in furtherance and affirmation of said illegal and void contract, and cannot, therefore, be maintained.

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Question reserved: Could complainant repudiate the contract and tender back to defendant the shares of stock delivered under it, and then recover of defendant the money paid for the shares?

FROM KNOX.

Appeal from Chancery Court of Knox County.
H. R. GIBSON, Ch.

GREEN & SHIELDS for Marble Company.

W. C. KAIN for Harvey.

LURTON, J. The complainant is an Ohio corporation, and was organized under the general incorporation law of that State "for the purpose of cutting, dressing, manufacturing, selling, and disposing of marble, stone, slate, granite, and other substances, with such other incidental and necessary powers essential to carry on said business." This company, with its place of business in Cincinnati, Ohio, has acquired the entire issue of shares made by a Tennessee incorporation, engaged in a similar business and under a similar charter, and known as the "McMillin Marble Company." Its last acquisition of shares was under a contract with the defendant, who was president of the Tennessee company, and who owned, at the time of the sale, twenty-five shares, being one half of

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the entire stock of the company. These shares he conveyed to a trustee, selected by the purchasing corporation, for its use and benefit. The consideration for the sale was the payment of six thousand dollars, the defendant assuming and agreeing to personally pay off and discharge one-half of all liability which might be fixed upon the McMillin Marble Company as a result of certain suits against that company then pending in the Courts of this State.

The bill alleges, and the evidence establishes, that the complainant company has been compelled, in order to protect the property of the McMillin Marble Company, to pay out about the sum of three thousand dollars in settlement and satisfaction of the claims in suit at time of its contract with defendant.

The relief sought is a decree against defendant for one-half this sum, being the proportion he agreed to pay under his agreement of sale.

The defense is that the contract of sale to the complainant company was unlawful and void; that is to say, that the purchase of these shares was outside the objects of its creation as defined in its charter, and is therefore such a contract as is not only voidable, but wholly void and of no legal effect; that it is not a case of excessive use of a power granted, but that no power whatever was conferred to deal in or hold the shares of another corporation; that the suit is one upon a void contract and in furtherance of it, and that

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it should not be entertained by a Court of law or equity.

"The rule in the United States," says Mr. Green, the American editor of Brice's Ultra Vires, "is that a corporation cannot become a stockholder in another corporation unless by power specifically granted by its charter or necessarily implied in it." Green's Brice's Ultra Vires, 91, note *b*, and American cases cited.

"A corporation has no implied right to purchase shares in another company for the purpose of controlling its management; nor may a corporation hold shares in another company as an investment, unless this be the usual method of carrying on its own proper business. A corporation must carry on its business by its own agents, and not through the agency of another corporation. It is clear also that a corporation has no implied right to speculate in shares, unless this be the kind of business for which the company was formed." 1 Morawetz, on Corporations, Sec. 431.

The evidence shows that the declared purpose of complainant in buying in the shares held by the defendant was to enable it to manage and control the business of the Tennessee company in the interest of the Ohio company.

There is no pretense that it had any express power to purchase shares in another company, and it is too clear to need argument or further citation of authority, that it had no implied authority to purchase and hold shares, either in its own

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name or in that of a trustee, for the purpose of controlling another corporation. That these corporations were engaged in a similar business does not help the case. The purpose and intent in granting a charter is, that the corporation shall carry on its business through its own agents, and not through the agency of another corporation. The public policy of this State will not permit the control of one corporation by another. Especially is this true when a foreign corporation thus undertakes to control and swallow up a domestic company. Such control of one corporation by another in a like business is unlawful, as tending to monopoly.

The result is, that this purchase of shares for the express object of controlling and managing another corporation was *ultra vires*, and, therefore, unlawful and void. Being void, it was of no legal effect, and no rights result from it enforceable by or through the Courts of the State, when such aid is invoked in furtherance of the unlawful agreement.

But it has been insisted very earnestly by the able and learned counsel for complainant, that where the contract has been fully executed by the plaintiff, the defendant should not be permitted to invoke such defense to a suit brought to compel performance; that to permit such a defense would work injustice, and enable defendant to repudiate his liability while holding on to the price he has received. There are cases where, the contract be-

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ing fully executed on both sides, the Court, in the interest of justice, has refused to aid either in obtaining a rescission. *Whitney Arms Co. v. Barlow*, 63 N. Y., 62, is one of this class.

So there are cases where the defense of *ultra vires* has not been entertained when the defect was in the mode of executing the contract or in the power of the agent.

So there are many cases holding the party relying upon the defense of *ultra vires* to an accountability for the benefits received. Green's Brice's Ultra Vires, 717, and note at end of chapter.

Again, there are cases where the Courts have refused to entertain suits to recover property from corporations which is held in excess of charter capacity. In such cases the Courts have held that the defect in power could not be set up in a collateral way, and that the State only could complain of such violation. To this effect were our own cases of *Barrow v. Turnpike Co.*, 9 Hum., 303, and *Heiskell v. Chickasaw Lodge*, 87 Tenn., 668.

The question here is not like any of these. The complainant sues upon its contract, and, in affirmation of it, seeks to have the defendant perform an agreement which sprang from, and was collateral to it. It has received the shares it purchased, and holds on to them. It simply asks that the defendant be further compelled to perform his contract by contributing, in accordance with his agreement, his proportion of the liability paid off by complainant in protection of the property

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of the McMillin Marble Company. The suit is clearly in furtherance of the original, unlawful, and void contract. That the contract has been executed by the plaintiff does not make it lawful or entitle it to an enforcement of it.

This proposition was very plainly put in *Pittsburg, etc., v. R. & H. Bridge Co.*, where it was stated, as a result of all the previous decisions of that Court upon this subject, "that a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into effect, become lawful and valid; but the proper remedy of the party aggrieved is by disaffirming the contract, and suing to recover, as on a *quantum meruit*, the value of what the defendant has actually received." 131 U. S., 389.

The case of *Central Transportation Co. v. Pullman Car Co.* is an exceedingly interesting case, as it involved a consideration of the circumstances under which a defendant may interpose the defense of *ultra vires*, notwithstanding full performance by the plaintiff. ^

In that case, the Central Transportation Company had leased and transferred all of its property of every kind to the defendant company, which was engaged in a similar and competitive business. The lessee company undertook to pay all of the debts of the lessor company, and to pay to it annually the sum of \$264,000 for a term of ninety-nine years. Possession was taken, and

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the installments paid for a number of years. The suit was for a part of the installment for the last year before suit. The defense of *ultra vires* was interposed and sustained, the Court holding that the sale was unauthorized and in excess of the power of the selling company. It was urged for the plaintiff, as in this case, that, even if the contract was void, because *ultra vires* and against public policy, yet that, having been fully executed on the part of the plaintiff, and the benefits of it received by the defendant for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to an action to recover the compensation agreed on for that period.

After reviewing its own decisions upon this branch of the case, that Court said:

"The view which this Court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: A contract of a corporation which is *ultra vires* in the proper sense—that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature—is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have

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been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the Legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But where the contract is beyond the powers conferred upon it by existing law, neither the corporation nor the other party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by law.

"A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the Courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as it could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for property or money which

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it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract." 139 U. S., 60.

This seems to us to fully and clearly state the rule. The passage cited by counsel from *Railway Co. v. McCarthy*, 96 U. S., 267, "that the doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail when it would defeat the ends of justice, or work a legal wrong," is misleading; and, if literally construed, would result in an enormous practical extension of the powers of corporations.

We do not understand that a result required by adherence to the law would be either unjust or a legal wrong. The learned Judge doubtless intended it to be understood that the defense would be a legal wrong only when the law did not require its consideration by the Court.

This passage, and one of similar character in *San Antonio v. Mehaffy*, 96 U. S., 312, was uncalled for in the case in which it was used, and in *Central Transportation Co. v. Pullman Car Co.*, *supra*, was characterized as "a mere passing remark."

To sustain this suit, as now presented, would be in affirmation and furtherance of an, unlawful and void contract. It is in no sense a suit in disaffirmance.

Whether complainant could tender back the shares received, and maintain a suit to recover the money paid for the shares upon an implied agreement to return money which the defendant had

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no right to retain, is a question not presented upon this record.

The decree dismissing the bill must, upon the grounds herein stated, be, and accordingly is, affirmed.

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*** RADFORD TRUST COMPANY *v.* LUMBER COMPANY.**

(Knoxville. February 7, 1893.)

1. SUPERSEDEAS. *Of judgment of Supreme Court not granted, when.*

A valid final judgment of this Court cannot be superseded after close of term at which it was rendered, upon averment that the Court erred in its decision of the case.

2. JUDGMENTS. *Of Supreme Court valid when special Judge participated.*

A final judgment of this Court is valid, and its execution will not be arrested by supersedeas after close of term, when it was pronounced by the Court, when composed of four regular Judges and a disinterested lawyer sitting by consent of Court and parties, but without a commission, in the room and stead of the absent member of the Court. There was present a quorum of the regular Judges. The participation, with consent of Court and parties, of a disinterested lawyer with a quorum of the regular Judges, in the hearing and determination of a cause, will not vitiate the judgment, whether he be considered as acting as a Judge without a commission or in the capacity of *amicus curiae*.

Code construed: § 4682 (M. & V.); § 3921 (T. & S.).

Cases cited and approved: McCombs *v.* Guild, 9 Lea, 81; Brogan *v.* Savage, 5 Sneed, 693; Wroe *v.* Greer, 2 Swan, 172; Crozier *v.* Goodwin, 1 Lea, 128; Holmes *v.* Eason, 8 Lea, 754; Posey *v.* Eaton, 9 Lea, 501; 110 Penn. St., 598; 6 Q. B., 753; 3 N. Y., —.

Cited and distinguished: Glasgow *v.* State, 9 Bax., 485; Neil *v.* State, 2 Lea, 675.

Cited and disapproved: 4 Greene, 104; 7 Clarke, 487; 39 Wis., —.

Cited as overruled: Reams *v.* Kearns, 5 Cold., 217; Smith *v.* Pearce, 6 Bax., 72; Pierce *v.* Bowers, 8 Bax., 353.

3. SAME. *Same. Consent to sitting of special Judge.*

Upon collateral attack of a judgment, consent of parties to the participation of a special Judge, acting without commission in its rendition, is conclusively proved by the record recital of such consent. Objec-

*This application was made while Court was in session at Nashville, and was passed upon by all the Judges.—REPORTER.

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tion to the sitting of such special Judge would, in such case, be treated as conclusively waived if the record were silent on this point.

Cases cited and approved: Kilcrease *v.* Blythe, 6 Hum., 378; Pope *v.* Harrison, 16 Lea, 92.

FROM KNOX.

Appeal from Chancery Court of Knox County.
H. R. GIBSON, Ch.

GREEN & SHIELDS for Radford Trust Co.

H. M. WILTSE for Lumber Co.

LURTON, J. At the September Term of this Court, held at Knoxville, the decree of the Chancellor in favor of the Radford Trust Company, and against the East Tennessee Lumber Company and another, was affirmed, and an execution ordered to issue for the debt and costs. The defendants have now filed a petition in the cause, praying that the decree be superseded.

So far as this relief is predicated upon the merits of the original cause, it must be most manifest to learned counsel that it cannot be considered. The decree was final. The term has passed, and all power to inquire into the merits of the litigation is gone.

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But petitioners insist that the decree was *void*, and should therefore be superseded. This allegation of voidness is predicated upon the statement that the opinion of the Court affirming the Chancellor's decree was announced by Special Judge T. S. Webb. On this point the petition states that Judge Webb "was acting as special Judge in the absence of Hon. Peter Turney;" that "a petition to rehear was filed, which also came to the hands of said Special Judge Webb, and was dismissed November 12, 1892." It also states, "upon information and belief," that "when the said special Judge sat at the hearing of the said cause, and when he delivereded the opinion therein, and when he considered and dismissed their petition to rehear, he was acting without authority, and was disqualified and incompetent to so act by reason of the fact that he had not been appointed or commissioned so to act by the Governor of the State, as required by law." After stating that no ground existed for the appointment of a special Judge, the petitioners then aver that "during the absence of Judge Turney the said Webb sat and acted in certain cases by consent of parties, as shown by the record, but they are advised that their assent, or that of their counsel, would have been necessary to render him competent to sit and act in this case, and *they state that no such consent was given.*"

It is at the outset to be observed that the petition nowhere states or intimates that, either upon the original hearing nor upon the application for

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a rehearing, was there any objection advanced or intimated to the sitting of Judge Webb. As to the allegation that no consent was given to his acting as Judge on the hearing of this case, it is sufficient to say that this is explicitly contradicted by the record. The decree in the cause recites "that the cause was heard October 27, 1892, before the Honorable Supreme Court of Tennessee, sitting at Knoxville, * * * and the Court, being of opinion that there is no error in the decree, the same is in all things affirmed, and defendant's assignments of error overruled."

If we limit the examination to the recitals of the particular decree, it would not appear who composed the Court, or that any other than the regular members of the Court participated in its action. No written opinion seems to have been filed, and we cannot be aided by resorting to such opinion. If we look, however, to the caption of the minutes of the Court—and this is part of the record, by which the validity of the decree is to be determined—we find this recital: "Thursday, October 27, 1892. Court met pursuant to adjournment. Present and presiding, the Hon. Horace H. Lurton, Waller C. Caldwell, Benj. J. Lea, David L. Snodgrass, and Hon. T. S. Webb, Special Justice, *sitting by consent of counsel.*" The record must be tried by the record. Its recitals, in a collateral attack, import absolute verity. No averment can be made against the record which depends upon extraneous facts. *Kilcrease Heirs v. Blythe*, 6

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Hum., 378; *Pope v. Harrison*, 16 Lea, 92; Cooley on Con. Lim., 5045.

It must therefore be taken that T. S. Webb, in the absence of Chief Justice Turney, sat as his substitute, and acted as a special Judge by consent of the counsel representing the parties in this cause, and by consent of the Court.

But counsel have in argument assumed the position that consent does not operate as a commission, and that no consent of parties can make a Judge, or authorize one not a lawful Judge to sit and act as a Judge. In support of this position, counsel cite and rely upon a paragraph from the work of Judge Cooley upon Constitutional Limitations, in these words: "If the parties cannot confer jurisdiction upon a Court by consent, neither can they by consent empower any individual other than the Judge of the Court to exercise its powers. Judges are chosen in such manner as shall be provided by law, and a stipulation by parties that any other person than the Judge shall exercise his functions in their case would be nugatory, even though the Judge should vacate his seat for the purpose of the hearing." Side-pages 399, 400.

In support of this view the eminent author cites the single case of *Winchester v. Ayres*, 4 Greene (Iowa), 104.

The Iowa Court did hold an Act permitting selection, by agreement, of a member of the bar to act as Judge of the Circuit Court to be un-

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constitutional. But in the later case of *Smith v. Trisbie*, 7- Clarke (Iowa), 487, *Winchester v. Ayres* was questioned, the Court declining to hold further than that if there was *objection* by either party, at the trial, the judgment on appeal would be reversed.

The case of *Van Slyke v. Insurance Company*, 39 Wis., is further cited in support of the view stated by Judge Cooley. A statute of Wisconsin provided that a change of venue should be ordered whenever either party to a pending suit should file a petition showing prejudice entertained by the regular Judge, unless the parties, or their attorneys, should file with the clerk a written stipulation agreeing that some member of the bar should act as Judge in that case, and empowering such attorney so selected to act as Judge in the particular case. This course was pursued, the regular Judge "stipulated" off the bench, and the trial had before an attorney acting under this statute. On *appeal* by the losing party the constitutionality of the statute was assailed. The Court held it void, upon the ground that the Constitution of the State conferred judicial power only on Judges elected in the mode pointed out by the Constitution; that the Legislature could not confer judicial power upon other than constitutional Judges, and that the parties to a suit could not, by consent, confer power to act as a Judge upon one not designated by the Constitution.

All of this may be conceded. Consent will not make a Judge. If the Constitution prescribes

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the mode and manner of electing or appointing a Judge, no other manner of appointing one can be resorted to. But it seems to us that this is not the question to be decided. A question precisely similar in principle arose in this State under our Act of 1858, Chapter 90, carried into the Code as Section 3921 (T. & S.). This section reads as follows: "The parties may, by consent, select some member of the bar to preside as Judge or Chancellor in all civil cases where the regular Judge or Chancellor is incompetent; and this consent, entered of record, shall vest the person selected with the full power and authority of the regular Judge or Chancellor in the particular case." This statute has been almost daily acted under, as is well known to all members of the bar. Its constitutionality was assailed upon the grounds urged against the Wisconsin statute. Upon this question Judge Caruthers, speaking for the entire Court, said:

"It is argued that this Act is unconstitutional, because a Judge cannot be appointed but in the mode therein prescribed; that it is in contravention of this provision for the parties to make a Judge by agreement. But this Act does not authorize the parties to make a Judge, but only a person 'to act as Judge' in their particular case, in which the Judge of the circuit is incompetent. If the provision had been that, in such cases, the parties might, by agreement, select some attorney to decide the case or to preside over twelve other

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men, who should decide upon the facts, under his instructions as to the law, could there be any objection? But if there was any thing in the name, he is not so entitled in the law, but only that he is to 'act as Judge.' That is, the powers that a Judge would have and exercise in the particular case, are conferred by agreement of the parties upon the person thus selected. It can make no difference that the regular machinery of the Court is to be used in the case, under the direction of such person. It is all by agreement; there is no compulsion. It is confined to a special case, in which the regular Judge cannot legally preside. It cannot affect the question that the case is to be tried and decided in the court-house, in term time, with a jury and Clerk and Sheriff. He is not a Judge, nor are gentlemen appointed to fill the place of one or more members of this Court who are incompetent, Judges; but they are, by the law, clothed with the same powers for the particular cases. They are to 'act as Judges.' They are to have the power and authority of Judges in the cases to be tried before them. Under this Act, the plain and easy mode of correcting errors may be resorted to which applies to ordinary cases. In this, it is better for the parties than arbitrations."

Brogan v. Savage, 5 Sneed, 693.

Under the reasoning of this case, it is clear that the validity of the action of such an agreed Judge rests upon the consent of the parties. Without the Act the effect would perhaps have been the same, pro-

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vided the regular Judge assented to the action of the parties in providing for such a special tribunal. The Act had no other constitutional effect than to require him to *permit* the agreed Judge to sit and "act as Judge" in the particular case, and that his minutes should record the judgment.

The Code provision we have been considering applied only to cases where the regular Judge was *incompetent*.

In *McCombs v. Guild*, 9 Lea, 81, it appeared that the regular Judge was engaged upon *other business*, and therefore the parties agreed that C. W. Heiskell, with the consent of the parties, should act as special Judge, and his judgment be entered as the judgment of the Court, both parties reserving right of appeal. The bill of exceptions and the judgment of the Court were signed by the special Judge. Judge Cooper thought that no appeal could be taken from a judgment so rendered, but the other four members of the Court held that, in the absence of a motion to dismiss the appeal, this Court had obtained jurisdiction.

The Judge was not *incompetent*, and the reason for the sitting of Judge Heiskell appeared on the minutes of the Court. The judgment rested entirely upon the efficacy of the consent given to the action of the special Judge. Yet the judgment was not held void, the only question raised as to it being as to whether it was such a judgment as could be appealed from. That the judgment of one "acting as Judge" by consent in a

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criminal case is void, is by no means controlling in a civil cause. Criminal cases cannot be arbitrated.

The cases of *Glasgow v. State*, 9 Bax., 485, and *Neil v. State*, 2 Lea, 675, are limited to prosecutions for crime. In the latter case Judge Cooper puts the reason of the rule upon the ground that "a person charged with a crime ought neither to be required nor permitted to select a Judge to try his case." The same disability exists in regard to all the *essentials* of a criminal trial, the defendant not being bound by a waiver of any constitutional right. But in civil causes a different rule prevails.

The Constitution expressly *disqualifies* and *prohibits* a Judge from sitting in any case in which he is *interested*, or *related* to the parties, or in which he may have been of counsel. Judge Cooley's views seem to be that these constitutional disqualifications cannot be waived, and that the judgment would be void, although no objection was made. Con. Lim., side-page 413.

To support this opinion, he cites, with others, our own case of *Reams v. Kearns*, 5 Cold., 217. In that case, a Chancellor had pronounced a decree in a cause in which he had been of counsel. This Court held the decree a nullity, although no objection appeared to have been made. The decision was in conflict with the earlier case of *Wroe v. Greer*, 2 Swan, 172, wherein the Court, through Judge Totten, said: "The objection for incompetency of the Justice should have been

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taken before him, and before a trial on the merits. If not so taken, the objection is waived; for a party may waive, and preclude himself from taking any objection to a decision on account of the Judge being related to one of the parties, and the waiver may be express or by necessary implication." This case was not referred to by Judge Milligan in deciding the Kearns case.

Reams v. Kearns was followed in the subsequent cases of *Smith v. Pearce*, 6 Bax., 72, and *Pierce v. Bowers*, 8 Bax., 353. But in *Crozier v. Goodwin* advantage was sought to be taken, on appeal, of the fact that the Chairman of the County Court pronouncing the judgment was incompetent, by reason of relationship. Without noticing *Reams v. Kearns*, or the two subsequent cases following it, this Court unanimously held that the incompetency was waived by failure to take objection *in limine*, Judge Freeman, who spoke for the Court, saying: "It would be monstrous to allow a party to acquiesce in the action of such a Court without objection, and then, on appeal, show the fact as ground for reversal." 1 Lea, 128.

In *Holmes v. Eason*, 8 Lea, 754, the Court approved the decisions in *Wroe v. Greer* and *Crozier v. Goodwin*, *supra*, and overruled *Reams v. Kearns*, *Smith v. Pearce*, and *Pierce v. Bowers*. In *Posey v. Eaton*, 9 Lea, 501, the ruling in *Holmes v. Eason* was approved unanimously. The right to a trial by an impartial Judge is a very high right, but these cases establish not only that one may consent

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to a trial before a disqualified Judge, but that, if he fails to object, he is conclusively presumed to consent. The right to waive a right is the highest of all rights. If the constitutional disqualifications may be waived by failure to object, we cannot see why one who consents for a learned and disinterested lawyer to sit and "act as Judge," or as the substitute for an absent Judge, is not estopped to afterwards complain when an adverse result is reached.

Consent did not make him a Judge, but it authorized him to "act as a Judge;" and if the Court with whom he sat consented to give effect to his opinion by adopting it, and rendering judgment in accordance with it, petitioners cannot complain. The judgment is not void or voidable.

But upon another ground we reach the same result. We have heretofore treated the case as if a single Judge constituted the Court. The Constitution prescribes that this Court shall be composed of five Judges; yet the same instrument prescribes that the concurrence of three shall make a constitutional judgment. The same number which may render a judgment constitute a quorum of the Court, and may sit as a *Court* in the absence of the minority.

It appears from the judgment and minutes that the "*Court*" sat and *heard* and *decided* this cause. The minutes show four of the regular members present and participating. Three of these were competent to decide the case. All four appear to

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have concurred in the judgment. Even though there might have been difference of opinion, the "Court," as an organized body, directed the entry which was made to be made, and thus registered it as the judgment of the "Court." It is not intimated, even if material, that the vote of Special Judge Webb was necessary to reach a conclusion. That he announced the *opinion* of the Court is wholly immaterial. It was not his opinion, but the opinion of the Court announced by its direction. Whether he was competent or incompetent, whether he sat with or without color of title, is in such case immaterial. The concurrence of the regular members of the Court in adopting his opinion as the opinion of the Court operated to give it force and legality. If he be treated merely as *amicus curiae*, it is of no consequence. He, by direction of a quorum authorized to sit and decide the cause, *announced* what the judgment of the "Court" was.

In a late Pennsylvania case, it was urged that the judgment of a Court, composed of three members, was void, because the judgment was announced by a member of the Court whose commission had expired, and who was no longer a Judge. The Court of Appeals, upon consideration of this objection, said: "There is no doubt but that the Court was properly held by the associates. The rule had been argued before all the Judges, and certainly there was nothing either improper or unlawful in the enunciation of their opinions, either by the associates or by the former

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law Judge as *amicus curiae*. * * * Even had the associates alone heard and made disposition of the rule, there would, according to the decisions above cited, have been no error." *Risber v. Boos*, 110 Penn. St., 598.

The circumstance that one not a member of the Court participated in the hearing, consultation, and decision, when such person does so by consent of the Court and of the counsel in the case, cannot, and ought not, have the effect upon the judgment of a participation by one *interested* in the result. In the latter case the Court might regard the fact that the *vote* of such interested party was not vital as immaterial, in view of the impossibility of determining how far the influence of such interested person might have affected the result. The case of the *Queen v. Justices of Hertfordshire*, 6 Q. B., 753, was a case of this latter class, as was that of *Oakey v. Aspinwell*, 3 N. Y. But when the objection is, not that the disqualified person, joining with a Court of several in the hearing and determination of a cause, was himself *interested* in the result, but that he was without a commission, and it further appears that this participation was by consent of counsel and of the Court, the doctrine of the cases cited above has no application. The right to a trial before a full bench, or a bench exclusively of Judges in commission, are rights, but they are rights which may be waived. The entire Court concur in this opinion.

Petition dismissed.



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
MIDDLE DIVISION.

NASHVILLE, DECEMBER TERM, 1892.

HOLDER *v.* RAILROAD.

(*Nashville.* December 10, 1892.)

WIDOW. *May compromise and receive damages for husband's wrongful killing.*

A widow whose husband has been killed by another's wrongful act, may compromise and settle the statutory right of action for damages that survives to her for the benefit of herself and the husband's next of kin, either before or after she has brought suit thereon. She may likewise receive and receipt for the entire damages, and, upon payment to herself of the amount agreed upon, she may discharge the wrong-doer from all further liability, either to herself or the husband's next of kin.

Code construed: §§3130-3132 (M. & V.); §§2291, 2292 (T. & S.).

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Cases cited and approved: Greenlee *v.* Railroad, 5 Lea, 418; Stephens *v.* Railroad, 10 Lea, 448; Webb *v.* Railroad, 88 Tenn., 119; Railroad *v.* Lilly, 90 Tenn., 563; Railroad *v.* Pitt, 91 Tenn., 86; Railroad *v.* Acuff, *ante*, p. 26.

FROM FRANKLIN.

Appeal from Chancery Court of Franklin County.
T. M. McCONNELL, Ch.

ESTILL & ALEXANDER for Holder.

GRANBERY & MARKS, EAST & FOGG, and J. D. B.
DeBow for Railroad.

CALDWELL, J. This cause comes up on bill and demurrer.

Complainants allege that W. E. Holder, while in the employment of the Nashville, Chattanooga & St. Louis Railroad Company as an operative on one of its trains, was killed by and through the negligence of said company; that he left surviving him a widow and five children; that, before the filing of the bill, the widow, for the sum of \$1,250, compromised and settled the statutory cause of action accruing to her and the children against said railroad company, for the wrongful killing of the husband and father; that the railroad company

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had paid the whole of said \$1,250 to the widow, and no part thereof to the children.

Upon the facts thus alleged, complainants further allege, as matter of law, that the widow and children of W. E. Holder were entitled to equal shares of the \$1,250, one-sixth each; that the widow was not authorized to receive any part of that sum except her one-sixth; that the railroad company is liable to the children for their respective shares of the \$1,250, notwithstanding its payment of the whole sum to the widow.

The bill is filed in the name of the children, by next friend, against the railroad company and the widow; and a recovery is sought against the railway company, in the first instance, for five-sixths of \$1,250.

The railroad company demurs to the bill, and for cause of demurrer says, in substance, that the widow had full legal power to control the right of action, and that, having such power, she also had the power to receive the full sum of \$1,250 for the parties entitled, and that the payment to her was, therefore, a full satisfaction of its liability.

The demurrer was sustained, and the bill dismissed as to the railroad company. Complainants appealed.

At the common law, the widow and children of W. E. Holder would have had no right of action against the railroad company for wrongfully taking his life. The right of action which he had for the injuries negligently inflicted upon his person,

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would have been extinguished by his death, but for our statute, which keeps it alive, and provides that it "shall pass to his widow, and, in case there is no widow, to his children, or to his personal representative, for the benefit of his widow or next of kin." Code (M. & V.), § 3130; *Railway Company v. Lilly*, 90 Tenn., 563; *Railroad Company v. Pitt*, 91 Tenn., 86.

The action may be instituted by the widow, or by the children, if there be no widow, or by the personal representative. The widow has the first right of suit; and the words of the statute which confer upon her the primary right to sue, have been held to give her the power to compromise her suit, over the objection of the children, and without let or hinderance from any one. Code, §§ 3130, 3131, and 3132; *Greenlee v. Railway Company*, 5 Lea, 418; *Stephens v. Railway Company*, 10 Lea, 448; *Webb v. Railway Company*, 88 Tenn., 119; *Railway Company v. Acuff*, ante, p. 26 (20 S. W. R., —).

The last-named case, though holding that the widow has no power to compromise *the suit of the personal representative*, distinctly recognizes her right to compromise *her own suit*.

Having full power to compromise her pending suit, as adjudged in the Greenlee and Stephens cases just cited, the widow, for the same reason, has power to compromise the whole right of action before suit is brought, as is alleged to have been done in the case at bar. If she may compromise

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her suit after it is brought, she may compromise the right of action before suit is brought. This is too manifest to admit of elaboration.

Complainants concede, on the face of their bill and by the argument of their counsel, that Mrs. Holder had ample power to make the compromise mentioned in the bill, and that it is binding on all parties concerned. They distinctly recognize the validity of that compromise, and seek to enforce their rights under it; but they contend that her power to represent the children in the matter ceased when an agreement had been reached as to the amount to be paid by the railroad company—that she had no power to receive their part of the money, and that the payment to her was, therefore, inoperative as to them.

We find no such limitation of her power in the statute.

To our minds it is clear, under the facts alleged in the bill and the authorities herein cited, that Mrs. Holder had the legal right to receive, for those entitled, the whole of the \$1,250, and that its payment to her was a complete satisfaction of all demands against the railroad company. The power to compromise the statutory right of action for all persons concerned carried with it, as a necessary consequence, a right on her part to receive for them the whole sum stipulated in the compromise. If the fact that the statute confers upon the widow the first right to sue, authorizes her to fix, by agreement, the aggregate amount to be paid by

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the wrong-doer to her and the children, it also authorizes her to receive that amount for herself and them. Her *bona fide* compromise binds the children, and her *bona fide* receipt of the money paid under the compromise, likewise, and for the same reason, binds them. In the one instance, as in the other, the widow's priority of right to sue justifies her representation of all the beneficiaries, herself and her children.

It is said that to allow the widow to receive the whole of the compromise money is to endanger the interests of the children therein. That may be true; yet we think the statute capable of no other reasonable construction.

The right of the widow to receive the money after compromise is no more perilous to the children than her right to make the compromise agreement in the first instance. If in either respect the Legislature has not sufficiently guarded the interests of the children, or has conferred too much power on the widow, the defect is curable by legislative amendment, not by judicial construction.

What the relative and respective interests of the widow and children in the \$1,250 are cannot properly be determined in the present aspect of this case. The claim of the children, in their bill, that each of them is entitled to an equal share with the widow is not put in issue by the demurrer; and, besides, the question is one in which the railroad company has no interest.

Affirm, with costs.

Lewis *v.* Glass.

LEWIS *v.* GLASS.

(Nashville. December 15, 1892.)

1. TENANCY BY THE CURTESY. *Does not attach to wife's leaseholds.*

The husband's tenancy by the courtesy does not attach to wife's leasehold interests in land. This rule of the common law has not been changed by statute in this State.

Code construed: §§ 49, 3343, 3351 (M. & V.); § 51 (T. & S.).

2. CODE DEFINITIONS. *Applicable to Code provisions only.*

The Code definitions of words and phrases are applicable only in the construction of the Code provisions.

Code construed: § 49 (M. & V.); § 51 (T. & S.).

Cases cited and distinguished: Kelley *v.* Shultz, 12 Heis., 218; Burr *v.* Graves, 4 Lea, 552.

3. CHANCERY PLEADING AND PRACTICE. *Relief not granted upon averments of answer alone, when.*

In suits in Chancery affirmative relief will not be granted to the defendant upon the averments of his answer alone, without cross-bill, as to a matter not referred to in the original bill nor falling legitimately within its scope or purpose.

Cases cited and approved: Bussey *v.* Gant, 10 Hum., 238; Gross *v.* Davis, 87 Tenn., 226.

FROM FRANKLIN.

Appeal from the Chancery Court of Franklin County. THOMAS M. McCONNELL, Ch.

Lewis *v.* Glass.

MARKS & BANKS for Lewis.

BRANNAN & LEFEBER for Glass.

LEA, J. H. L. Lewis, testamentary guardian of the minor children of Mrs. F. A. Glass, and the children, by their next friend, Mrs. A. M. Lewis, their grandmother, filed the bill in this cause against F. A. Glass, alleging the death of the mother of the children, Mrs. F. A. Glass; that they were minors, and had been living with their uncle and grandmother for several years in Texas, where their mother had died; that she made a will giving the custody and guardianship of the children to H. L. Lewis, their uncle, and by said will, which was duly probated in Texas, giving the children her interest in a house at Sewanee, built by her own means upon a lot leased by her from the University of the South; that the defendant, F. A. Glass, was threatening to forcibly take possession of said house, and to take said children from the custody and possession of their uncle and grandmother; and prayed for an injunction, which was issued, enjoining the defendant from taking possession of the house, or from assuming control and custody of the children.

The defendant answered the bill, admitting that the children were minors, and alleging that he, as father, was entitled to the possession and care of the children, and that he was entitled to the dwelling for his life, as tenant by courtesy, admitting

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that his wife leased the land upon which the house was built from the University of the South, and that the house was built by the means of his wife, derived from her father's estate.

Much proof was taken as to the separation of F. A. Glass and his wife, and as to the place of her domicile at the time of her death, and as to whether it was to the interest of the children to remain with their uncle and grandmother, or with their father.

Upon the hearing the Chancellor decreed that he declined to make any order as to the children who were past the age of fourteen years, who had expressed a preference to remain with their grandmother and uncle, but gave the youngest to its grandmother as the most suitable custodian, and decreed that the defendant was entitled to a life estate in the house, as tenant by the courtesy, and gave him a recovery against H. L. Lewis and Mrs. A. M. Lewis for the amount of the rents of the house while in possession of complainants since the death of Mrs. Glass; also for the personal property of Mrs. Glass, rendering a decree for about \$1,604.

From so much of the decree as adjudged defendant to be entitled to an estate in the house as tenant by courtesy, and from so much as adjudged the defendant was entitled to recover for the personal property of Mrs. Glass, and for the use and occupation of said house and personal property, the complainants, Mrs. Lewis and H. L. Lewis, have appealed, and assign, among other assignments of

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error, first, that the decree adjudging an estate for life in said house, as tenant by courtesy, was erroneous, for the reason that the house was built upon leased ground, and there cannot be an estate by the courtesy in a leasehold. Second, because there could not be a decree for the personal property, or the value of its use, because such a decree would grant affirmative relief under an answer without there being any cross-bill filed.

Both of these assignments of error are well taken. A husband derives his right to the tenancy by courtesy alone from the common law. It is admitted in argument that at common law he had no courtesy in leasehold property, for it was regarded as personal property, and, of course, no such right could inhere in it. There was no seizin of the wife. But the claim to courtesy by defendant is based solely on changes effected by statute in this State.

Section 51 of the Code is relied on as giving the holder of a lease the "seizin" of the common law. That section provides that where, in the Code, the words "real estate," "real property," or "lands" are used, they shall include lands, tenements, and hereditaments, and all rights thereto and interest therein, equitable as well as legal. That section has been construed to make all statutes relating to real estate or lands apply to leaseholds. It has been construed to make an Act protecting the real estate of the wife and its profits from the creditors of the husband cover her

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leasehold interest. 12 Heis., 218. It has been construed to make a mechanics' lien Act, giving a lien for improvements on the land of another, cover a leasehold. 4 Lea, 552. The § 51 of the Code, defining the meaning of words used in its sections, can have no further effect than to modify the meaning of the words when used in enacted statutes. When the terms real estate and lands are used in statutes protecting the property of married women, or giving mechanics liens, or providing for the descent of property, leaseholds are embraced, for this section so provides. But there is no section of the Code providing that the husband shall have courtesy in the "land" or "real property" of his wife. As we have said, the husband derives his right to that tenancy from the common law, which prescribes that before he can enter into that estate, his wife must have been "seized" of the land during coverture. There is nothing in § 51 to mend the lack of seizin in the wife.

But it is insisted that by § 3343 and § 3351 of the Code (M. & V.), the husband's rights are so enlarged as to give him courtesy in his wife's leasehold. These sections are based upon Acts of the Legislature, passed subsequent to the adoption of the Code of 1858; and by an examination of said Acts it will most clearly appear that the powers and rights of married women over their estates were greatly enlarged, and the rights and authority of the husband correspondingly decreased, and therefore it was deemed prudent to provide that these

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Acts should not interfere with his right to courtesy. It merely saved out of the operation of the Acts one of the husband's already existing rights. It did not enlarge or increase any rights he had in his wife's estate.

In regard to the second assignment of error, that a decree was rendered in favor of defendant against Mrs. Lewis and H. L. Lewis for the personal property of Mrs. F. A. Glass, without a cross-bill or answer in the nature of a cross-bill, it will appear from the statement of the case that the bill was filed, praying an injunction against the defendant from taking control and possession of the minor children of Mrs. Glass, or of the house upon the leasehold. This was the only relief prayed for in the bill. There was no mention of any personal property therein. The bill was answered, and the only reference as to personal property in the answer is as follows: "Respondent will insist that he will be entitled to all the personal property belonging with said house," describing it. By the decree, he was given the property belonging to the house, damages for the use thereof, and an amount for the value of a horse and carriage, and other personal property. This decree was erroneous.

If a defendant seeks affirmative relief against the complainant, he must do so by a cross-bill or answer filed as a cross-bill. Gibson's Chancery Practice, Secs. 665, 666; Daniel's Chancery Practice, 1650; *Bussey v. Gant*, 10 Hum., 238; Gross

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v. *Davis*, 87 Tenn. Rep., 226. It results that so much of the decree as was appealed from, is erroneous. The defendant has no interest in the leasehold of his deceased wife, but the same, by her will, goes to her children; it follows, therefore, that no recovery for the rent or use of the house can be had by the defendant against complainants. Without deciding to whom the personal property belongs, we hold that the decree in regard thereto was erroneous in the present state of the pleadings. The injunction heretofore granted will be made perpetual. The house upon the leased lot having been placed in the possession of a receiver by order of the Court, to be rented out, this cause will be remanded for settlement with said receiver. The defendant will pay the costs of this Court and the Court below, for which let execution issue.

Jackson v. Bank.

JACKSON v. BANK.

(*Nashville.* January 5, 1893.)

1. BANKS AND BANKING. *Acceptance of check. Proof of.*

Acceptance by drawee bank of check drawn upon it by its customer, payable to the order of a particular person, is sufficiently proved in suit upon the check by the payee against the bank, where it appears that the bank paid the check upon its presentment and indorsement by an unauthorized person, and charged the amount to the account of the drawer, who had sufficient funds on deposit to meet it, and who afterwards lifted the check in settlement with bank.

Case cited and approved: *Pickle v. Muse*, 88 Tenn., 380.

Cited as disapproved: 94 U. S., 343.

2. SAME. *Duty of bank in reference to payment of checks.*

The drawee bank, having accepted, or being under obligation to accept, its customer's check drawn payable to the order of a particular person, is not discharged from liability to the payee, unless it has paid the check to him or upon his genuine indorsement. In this matter the bank acts at its peril. The possession of such check by a third person affords no presumption of authority in him to indorse it for the payee. Authority to indorse is not implied from authority to receive such check for the payee.

Cases cited and approved: *Pickle v. Muse*, 4 Pickle, 380; 46 Mo., 186.

3. SAME. *Drummer has no authority to indorse or collect check received for his employer.*

A drummer employed to sell and take orders for goods, to collect accounts, and to receive money or checks payable to his principal, is not authorized, without more, to indorse his principal's name on such checks and collect them. Payment to the drummer of such checks

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upon his indorsement of his principal's name does not protect the bank from liability to the payee.

FROM WARREN.

Appeal from Chancery Court of Warren County.
W. S. BEARDEN, Ch.

T. C. LIND and SMITH & DICKINSON for Jackson,
Mathews & Harris.

MURRAY & FAIRBANKS for Bank.

J. H. HOLMAN, Sp. J. The complainants were wholesale grocery merchants in the city of Nashville, and had in their employ, as a traveling salesman or drummer, one Gibson. Gibson's duty, under his employment, was to travel through the country, take orders from retail merchants for goods, and collect the bills as they became due.

For complainants, Gibson sold a bill of goods, amounting to \$228.90, to J. J. Meadows, of Warren County. On October 12, 1891, before Meadows' bill became due, and while Gibson was still in the service of complainants, he proposed to Meadows that, if he would then pay the bill, he would be allowed a discount of two per cent. To this Meadows agreed, and gave to Gibson his check on

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the defendant for \$224.39, payable to the order of Jackson, Mathews & Harris. In the face of the check was inserted the statement that it was "in full of account to date."

Upon the back of the check Gibson indorsed the names of complainants, "Jackson, Mathews & Harris, by Gibson," and presented it to the defendant bank, where it was paid to him by the cashier, and charged against the deposit account of Meadows. Gibson failed to pay over or account to complainants for this money.

Complainants, having learned that Gibson had collected other money due them, and failed to account for it, ordered him in, and discharged him. Gibson absconded. Subsequently, complainants sent to J. J. Meadows a statement of his account, requesting payment. Meadows replied that he had paid the account to Gibson by giving him a check on the defendant bank, and had settled with the bank, and took up the check. Complainants demanded of defendant payment to them of the check, which was refused.

Complainants filed their bill to hold the bank liable, and to recover the amount of the check, alleging that Gibson had no right to indorse complainants' name, and that the payment of the check to him was unauthorized.

The defendant answered, stating, in substance, that Gibson was authorized to indorse complainants' name to checks and secure the money thereon; that, if not expressly empowered, he was by implication

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authorized so to do; that Gibson, while in complainants' service, had frequently received checks payable to complainants, indorsed complainants' name, and secured the money thereon, and that these acts of Gibson were known to and had been ratified by the complainants; that they were estopped from denying his authority; and that it was inequitable for complainants to undertake to visit the consequences of their own negligence and misplaced confidence upon respondent.

The Chancellor was of opinion that it would be inequitable to visit the loss of the Meadows check upon the defendant, and dismissed the bill. Complainants have appealed.

In the brief of counsel for the defendant it is insisted that there is no such privity between the complainants and the defendant as will authorize the bringing of this suit; that where a check is made payable to the order of one person, and, upon the faith of a forged indorsement, the bank pays to another, this is not such an acceptance by the bank as will make it liable to the payee, because the bank did not accept the check for the payee, nor promise him to pay it, but, on the contrary, refused to do so. To sustain this position, the case of *Bank v. Whitman*, 94 U. S. R., 343, is referred to. It is true that the Court, in that case, held that a payment to a stranger upon an unauthorized indorsement does not operate as an acceptance of the check so as to authorize an action by the real owner to recover its amount as upon an accepted

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check. But the case of *Bank v. Whitman*, on this point, has been expressly dissented from by this Court, and we do not now regard this as an open question in this State.

In the case of *Pickle v. Muse*, 4 Pickle, 380, it was decided, in the opinion of a majority of the Court, that acceptance of a bank check, and promise to pay it in accordance with its directions, will be inferred where the drawee bank receives and retains the check, and charges it to the account of the drawer, who had sufficient funds on deposit to meet it, and subsequently lifted the check on settlement with the bank, although the check may have been presented to the bank by, and the money paid on it to, an unauthorized person.

All the members of the complainants' firm testify that Gibson had not been empowered to indorse the firm's name on checks received in payment for goods.

Several drummers were examined as witnesses for defendant, to prove, and a majority of them say, with some qualification, that it is the usage and custom of traveling salesmen and drummers who are empowered to collect and receipt bills and accounts, to indorse the name of their principals to checks received in payment for goods, and it is insisted that by implication Gibson was authorized to indorse complainants' name to the check, and receive the money. We do not think this usage or custom sufficiently proven, nor do we intimate an opinion that such a power can be inferred from

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usage or by implication. A person cannot, by proof, establish a usage or custom which, in his own interest, contravenes the established commercial law. *Vermilye v. Adams Express Company*, 21 Wall., 139.

No authority will be implied from an express authority. Whatever powers are strictly necessary to the effectual exercise of the express powers will be conceded to the agent by implication. In order, therefore, that the authority to make or draw, accept and indorse commercial paper as the agent of another may be implied from some other express authority, it must be shown to be strictly necessary to the complete execution of the express power. The rule is strictly enforced that the authority to execute and indorse bills and notes as agent, will not be implied from an express authority to transact some other business, unless it is *absolutely* necessary to the exercise of express authority. Tiedemann on Commercial Paper, Sec. 77. Possession of a check payable to order, by one claiming to be agent of the payee, is not *prima facie* proof of authority to demand payment in the name of the true owner. *Ib.*, 312. A bank is obliged by custom to honor checks payable to order, and pays them at its peril to any other than the person to whose order they are made payable. *Ib.*, Sec. 481. It must see that the check is paid to the payee therein named, upon his genuine indorsement, or it will remain responsible. *Pickle v. Muse*, 4 Pickle, 380.

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An authority to receive checks, in lieu of cash, in payment of bills placed in the hands of an agent for collection, does not authorize the agent to indorse and collect the checks. *Graham v. U. S. Savings Institution*, 46 Mo., 186; 1 Wait's Act. & Def., p. 284; 1 Daniel on Neg. Inst., Sec. 294.

The indorsement of the check was not a necessary incident to the collection of accounts. *Graham v. U. S. Sav. Institution*, 46 Mo., 186.

It follows that a drummer or commercial traveler, employed to sell and take orders for goods, to collect accounts, and receive money and checks payable to the order of his principal, is not, by implication, authorized to indorse such principal's name to such checks.

No equitable considerations can be invoked to soften seeming hardships in the enforcement of the laws and rules fixing liability on persons handling commercial paper. These laws are the growth of ages and the result of experience, having their origin in necessity. The inflexibility of these rules may occasionally make them seem severe, but in them is found general security.

The decree of the Chancellor is reversed, and a decree in favor of complainants against the defendant will be entered here for the amount of the Meadows check, with interest from date of filing the bill, and the costs.

Parks *v.* Hays.

PARKS *v.* HAYS.

(Nashville. January 5, 1893.)

1. LEASES. *Conditions in providing for forfeitures strictly construed.*

Conditions in leases providing for forfeitures are strictly construed.

Cases cited and approved: Levett *v.* Bickford, 8 Hum., 618; Planters' Ins. Co. *v.* Diggs, 8 Bax., 564; Allen *v.* Dent, 4 Lea, 677.2. SAME. *Waiver of condition of forfeiture for non-payment of rent.*

Condition in lease providing a forfeiture upon non-payment of rent is waived, unless, in the absence of special stipulation on the subject, the rent is demanded by the lessor at a suitable place upon the premises, and on the very day that it falls due, at a convenient hour before sunset.

FROM MOORE.

Appeal in error from Circuit Court of Moore County. M. D. SMALLMAN, J.

R. E. L. MOUNTCASTLE and R. A. PARKS for Hays.

W. D. L. RECORD for Parks.

LURTON, J. This is an action of unlawful detainer. The plaintiff is the lessor, and the defendant her tenant, who entered under a lease for the term of three years. Notes were executed for the

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rent reserved, payable six months apart, for equal sums. The first two notes were not paid at maturity, and suit was brought upon them as they severally fell due, and the landlord's lien enforced by attachment..

While the second suit was pending, this action was begun to recover possession under a forfeiture. The case was heard without a jury, and judgment rendered in favor of the plaintiff.

The clause in the lease under which the landlord claims a right of re-entry is in these words: "The said Hays is to pay \$500 per annum, as follows, * * * for all of which sums he has executed his notes; and, if he defaults therein, possession to revert to me, and he to forfeit all rights hereunder." No demand for payment of either of the two matured notes was made by the landlord upon the day of payment; nor is any demand shown to have been made upon the premises at any time. Conditions in leases providing for forfeitures are, at common law, strictly construed. The rule of the common law, as stated by Mr. Washburn, is this: "In order to avail himself of his right to enter and defeat the estate of the lessee for a breach of condition, there are certain things required by the common law to be done by the reversioner, in respect to which the law is quite strict, unless the parties shall, by agreement, have substituted something in its stead. If the condition be for the payment of the rent, there must be—

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"1. A demand of the rent precisely upon the day when the rent is due and payable by the lease, to save the forfeiture.

"2. It must be made a convenient time before sunset.

"3. It must be made upon the land, at the most notorious place upon it, which would be the front door of the dwelling-house, if there was one upon the land, unless some other place is agreed upon by the parties." 1 Wash. on Real Estate, side-page 321.

The rule is stated substantially in the same terms by Mr. Greenleaf. 1 Greenl. on Ev., Secs. 326, 327.

The lease before us makes no agreement as to place of payment, and it contains none waiving demand. No statute has changed the strict requirements of the common law, which has been regarded as fully in force in this State in regard to claims of forfeiture under conditions in leases. *Levett v. Bickford*, 8 Hum., 618; *Planters' Ins. Co. v. Diggs*, 8 Bax., 564; *Allen v. Dent*, 4 Lea, 677.

Reverse the judgment, with costs.

Lefeber *v.* Railroad.

LEFEBER *v.* RAILROAD.

(*Nashville.* January 21, 1893.)

1. COSTS. *Successful party's liability. Appeal.*

An appellant in a law cause who has obtained reversal and judgment for costs of appeal against the appellee is liable, upon motion of the interested parties, for all costs of the appeal that cannot be collected out of the appellee; and return of execution *nulla bona* that has been issued upon the judgment against the appellee is sufficient evidence that the costs cannot be collected from him.

Code construed: § 3928 (M. & V.); § 3204 (T. & S.).

2. SAME. *Motion may be made though cause is still pending.*

And appellant is liable, upon motion in this Court, for costs of such appeal after return of execution against the appellee *nulla bona*, although the cause is still pending undetermined in the lower Court.

Case cited and distinguished: *Stuart v. McCuistion*, 1 Heis., 428.

FROM FRANKLIN.

Appeal from the Circuit Court of Franklin County. M. D. SMALLMAN, J.

GEORGE E. BANKS for Lefeber.

EAST & FOGG and J. D. B. DEBOW for Railway Company.

Lefebre v. Railroad.

LURTON, C. J. James McDaniel recovered a judgment in the Circuit Court of Franklin County against the Nashville, Chattanooga and St. Louis Railroad Company. Upon the appeal of the defendant company, the judgment was reversed, the costs of the appeal taxed to McDaniel, and the cause remanded for new trial. Execution for the costs so adjudged issued from this Court, and has been returned *nulla bona*.

The plaintiff, who is Clerk of the Franklin Circuit Court, has given notice and moved for judgment over against the railroad company for part of the costs so adjudged against McDaniel, upon the ground that such costs accrued at the instance of the defendant company.

Section 3928 of the Code (M. & V.) provides that "all costs accrued at the instance of the successful party, which cannot be collected out of the other party, may be recovered, on motion, by the person entitled to them, against the successful party." The costs now sought to be collected are the costs of transcript, appeal bond, certificate, and seal. This transcript was made out upon the appeal of the railroad company, and at its instance, and is clearly "costs accrued at the instance of the successful party" within the meaning of the Code. The return of an execution is sufficient evidence that the costs could not "be collected out of the other party."

The objection that the motion is premature, the suit still pending, is not well taken. The judg-

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ment as to costs of appeal is final. The case may never be again before this Court, and we cannot know that it has not been already terminated. The case of *Stuart v. McCuistion*, 1 Heis., 428, is not in point.

Motion allowed. Costs of motion will be paid by defendant.

Miller v. Insurance Company.

MILLER v. INSURANCE COMPANY.

(Nashville. January 26, 1893.)

1. INSURANCE, ACCIDENT. *What injuries are covered by policy.*

An accident policy that insures the holder "against external bodily injuries effected through external violent and accidental means," covers an injury by gunshot through the wrist, sustained by insured while cleaning a shotgun, handling it in the usual manner for that purpose, and believing it unloaded, but which, being loaded, was discharged unintentionally in handling, by reason of a defect in its lock, which was unknown to assured. (*Post, pp. 169-172.*)

2. SAME. *What is not voluntary exposure to danger.*

And the injury, in such case, does not fall within that clause of the policy which exempts the insurer from liability where the assured's injury results "from voluntary exposure to unnecessary danger." (*Post, pp. 186, 187.*)

3. SAME. *Charter powers defined.*

An accident insurance company, limited by the express terms of its charter to insurance of persons against accidents sustained "*in traveling,*" is not liable for an injury such as that sustained by the plaintiff in this case, although the language of the policy is sufficiently comprehensive to embrace it. Insurance against such injury by such company is *ultra vires* and void. (*Post, pp. 172-174.*)

4. SAME. *Same.*

But an accident insurance company authorized by its charter "to make insurance against *disabilities* to persons by sickness or disease, or *other bodily infirmities,*" is liable upon its policy for an injury such as the plaintiff in this case sustained. (*Post, pp. 173-175.*)

5. CORPORATIONS, PRIVATE. *Defense of ultra vires available, when.*

Contracts of corporations made in excess of their charter powers are *ultra vires* and void. Such contracts are in contravention of public policy. And corporations are not estopped, although the contract

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has been executed in good faith by the other party, to make the defense of *ultra vires* to any suit brought to enforce such unauthorized contract. (*Post, pp. 174-177.*)

Cases cited and approved: *Marble Co. v. Harvey, ante*, p. 115; *Elevator Co. v. Railroad*, 85 Tenn., 705; *Mallory v. Oil Works*, 86 Tenn., 598; 22 N. Y., 285; 131 U. S., 389; 139 U. S., 60; 131 Mass., 258; 65 Ala., 448; 54 Ala., 471.

6. SAME. *Amendment of charters. Constitutional powers.*

Charters issued under the general incorporation Act of 1875 may be amended by general laws *adding* to the powers therein originally granted. Such amendments are authorized by the Constitution. It is not material whether the power to make them was reserved in the original Act. (*Post, pp. 172, 173.*)

Constitution construed: Art. XI., Sec. 8.

Acts construed: Acts 1875, Ch. 142; Acts 1889, Ch. —.

7. SAME. *Same. Estopped to deny acceptance of.*

Corporations are required by the general incorporation Act of 1875 to accept, by a prescribed method, amendments to their charters proposed by subsequent statutes, or, in default thereof, to wind up their affairs. A corporation remaining in business after the passage of a statute proposing a fundamental amendment to its charter, and exercising the additional powers conferred by the amendment, will be conclusively presumed to have regularly accepted the amendment, and will be estopped to deny acceptance thereof by the prescribed method, as to those who have dealt with the corporation in a matter within the scope of the amendment, believing that such acceptance had taken place in due form. (*Post, pp. 177-185.*)

Acts construed: Acts 1875, Ch. 142, Sec. 5; Acts 1889, Ch. —.

Cases cited and approved: *Nelson v. Haywood County*, 87 Tenn., 781; *Merriman v. Magiveny*, 12 Heis., 497; 92 U. S., 484; 19 N. Y., 482; 26 N. Y., 75; 61 Ala., 465; 83 Ala., 118.

8. SAME. *Same. Nature of amendments proposed.*

The Court does not decide whether the amendment of charter proposed in this case is fundamental, requiring, under Acts 1875, unanimous acceptance by stockholders, or merely auxiliary, and therefore not requiring acceptance in that manner. But the Court declares it "to be the sounder rule that only very material amendments, radical and vital in their character, should be regarded as requiring unanimous adoption;" and that an amendment should not be deemed funda-

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mental that does not change the character of the business, and simply authorizes its extension upon the lines of the original project. (*Post*, pp. 185, 186.)

Case cited and approved: 18 N. J. Eq., 185.

FROM DAVIDSON.

Appeal from the Circuit Court of Davidson County. W. K. McALISTER, J.

WEST & BURNEY for Miller.

BAXTER & HUTCHESON for Insurance Company.

LURTON, C. J. This case was heard by the Circuit Judge, without a jury, upon the following agreed statement of facts:

"On the eleventh day of February, 1890, the defendant issued an accident insurance policy to complainant, the original of which is hereto attached, marked 'Exhibit A,' and is the policy mentioned in the declaration. On the third day of April, 1890, plaintiff, with others, went snipe-hunting in the country near Clarksville, Tenn., plaintiff using a gun which was the property of W. P. Lawrence's father. Coming home in the evening, he placed the gun in the office of the Arlington Hotel, back of the clerk's desk.

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"On Saturday, April 5, Miller left his home about eight o'clock A.M., went direct to the hotel, found the gun where he had left it, and prepared to clean the gun, which was a breech-loading shotgun, in order to return it to Dr. Lawrence.

"He went into the billiard-room of the hotel, and procured a piece of billiard-cloth; went into the next house, which was then occupied as an office by L. A. Ragsdale, and also by Miller. There was no one present but W. D. Sheldon, the book-keeper of Ragsdale. Miller seated himself on a sofa, with his left side toward the door, with Sheldon near and in front of him. Miller began to clean the gun, which rested on his legs between his knees and hips, while Sheldon read an account of the floods in Mississippi. The muzzle of the gun was to his left side. While rubbing the gun with the cloth in his left hand it was suddenly discharged, the entire load of shot passing through his left wrist, which necessitated the immediate amputation of his arm between the elbow and wrist, which amputation was performed that day by Dr. Lawrence.

"Miller states positively that he did not know the gun was loaded, and that he does not know who placed the cartridge in the gun. He was perfectly sober. He afterwards learned, on examining the gun, that one barrel was very easy on the trigger, and the hammer could be thrown by striking the butt on the floor. This defect was remedied by a gunsmith some time afterwards.

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"He denies positively that he purposely discharged the gun, but claims it was purely an accidental discharge. He gave notice and made proofs of loss, as required by said association, which were received for by the defendant. All dues had been paid.

"The defendant, in 1887, procured and had properly executed, etc., a charter, of which 'Exhibit B,' attached hereto, is agreed to be an exact copy. It organized under same, and solicited business and issued policies of insurance against accidents up to and after April, 1890, using the form, 'Exhibit A,' in their business, and said association undertook to do no other kind of business. It paid many losses on account of accidents, but has paid plaintiff nothing on account of his injury. It is agreed that Miller had no *actual* knowledge of want of power in defendant to issue, and insure, as provided by said policies, if such want of power exists.

"It is admitted that said association took no action either to accept or reject the amendment passed by the Legislature in 1889, to charters for insurance companies. See Acts of 1889, Ch. 224, p. 445.

"Miller lives in Clarksville, Tennessee, where the accident happened."

The Circuit Judge, being of opinion that the contract of insurance, in so far as it undertook to insure against an injury occurring while the assured was not traveling, was beyond the power and au-

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thority of the defendant company under its charter, gave judgment for the defendant.

The policy held by the plaintiff insured him "against external bodily injuries effected through external violent and accidental means." It is clear that, all other questions aside, the contract covers the injury sustained by him.

The insistence of the defendant is, that under its charter it had no authority to make so broad a contract, and that its power to insure the plaintiff, by its organic law, was limited to insurance against accidents sustained "in traveling," and that, inasmuch as he was not injured while traveling, there can be no recovery in his favor.

The defendant corporation was organized in 1887, under the general Act of 1875 providing for the creation of private corporations. The power conferred by that Act upon insurance companies, in regard to insurance against accidental injuries, was limited to insurance against injuries to persons "in traveling." The Constitution of the State provides that "no corporation shall be created or its powers increased or diminished by special laws, but that the General Assembly shall provide by general laws for the organization of all corporations hereafter created, which laws may, at any time, be altered or repealed, and no such alteration or repeal shall interfere with, or divest, rights which have become vested." Art. XI., Sec. 8. The Act of 1875 reserved the right to repeal, annul, or modify all charters obtained thereunder. Without

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stopping to criticise the weight of the words contained in this Act, concerning the power to alter a charter by *adding* to the powers therein granted, it is sufficient to say that the power existed under the Constitution, and the Legislature, without regard to the reservation in the Act, had the right to amend any general law concerning the powers of corporations organized thereunder. Acting under its constitutional power, the Legislature of 1889 so amended the Act of 1875, in regard to the power of insurance companies, as to confer upon all such companies theretofore or thereafter organized under that Act, the power "to make insurance against *disabilities* to persons by sickness or disease, or *other bodily infirmities*." A disability is defined as "a deprivation of ability," "state of being disabled," "incapacity." The power conferred by the amendment was to insure against disabilities, whether such disability resulted from sickness or disease, or from "*other bodily infirmity*." One who loses a leg or arm or eye, or is otherwise disabled, whether temporarily or permanently, by external and violent means, is one suffering from an imperfection, and is to that extent disabled by a "*bodily infirmity*." But the defendant company insists that it cannot be held under the amendatory Act of 1889, inasmuch as it has taken no action in regard to this amendment, and that it is such an alteration in its charter as to be a fundamental amendment, and that, under Section 5 of the Act of 1875, such an amendment is inoperative as to it until

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it has been submitted at a general stockholders' meeting, and adopted by a majority of its shareholders.

For the plaintiff it is contended in answer to this defense—

1. That the contract has been executed upon his part, and that it would be inequitable and unjust to permit the corporation to rely upon the doctrine of *ultra vires* under such circumstances.

2. That by the issuance of a policy in express terms insuring him against injury by external, violent, and accidental means, without any regard as to whether such injury was sustained "in traveling," that it has assumed to exercise the power conferred by the amendment, and thereby represented to him that it had accepted and adopted the amendment in the manner necessary to obtain the power it had exercised; that it should, therefore, be estopped from showing that it had not in fact adopted the amendment.

3. That if none of these answers be well taken, he then insists that the amendment was not fundamental, but merely auxiliary, and that it was not necessary that such an amendment should be accepted by the voluntary action of the shareholders.

We will consider these matters in the order in which they have been stated.

We recognize a diversity of opinion in the Courts of America as to the right of either party to rely upon the defense of *ultra vires*, when the

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contract is not expressly prohibited, and is not immoral, and has been fully executed upon one side. The theory upon which the cases rest which hold that the defense is not to be entertained when the act is one merely in excess of express authority, seems to be that such a contract should be regarded as a mere breach of duty by the agents of the corporation, and that the State has ample remedy for such abuse, or for a usurpation of power, in a proceeding to annul the charter; that to permit such a defense is of no service to the State in preventing corporate usurpation, or in promoting the public interest, and only operates to encourage dishonesty and promote injustice. Resting upon one or more of these arguments, many cases might be cited. There are, then, a class of cases which take a distinction between acts merely in excess of authority and those which, in addition, are affirmatively forbidden, or immoral, or in contravention of some principle of public policy.

It seems to us that the true foundation of the doctrine of *ultra vires* lies in the proposition that every act of a corporation in excess of its power is an act in contravention of public policy, and for that reason to be held null and void. The ground upon which corporate privileges are conferred is, that the public interests may be thereby subserved. If this is not so, then all such concessions are mere acts of legislative favoritism, and contravene the foundation upon which free

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government is supposed to rest—that all are to be protected in the enjoyment of equal rights and privileges. Charters must be supposed, therefore, to be granted upon the supposition that some public interest is thereby advanced. “The Legislature is, therefore, presumed,” says Judge Seldon, in *Bennett v. R. R.*, 22 N. Y., 285, “to have granted just so much power and so many peculiar privileges as these interests are supposed to require.”

It must be, therefore, that any act in excess of these granted powers is an act contrary to public policy, and, upon that ground, illegal and void. Any other view, by which such acts are to be supported because executed, would operate as an enormous practical extension of the power of corporations. The view this Court has taken has therefore been that, “all acts outside the object of its creation, as defined in the law of its organization, and, therefore, beyond the powers conferred upon it,” are acts not voidable only, but wholly void. *Buckeye Marble Co. v. Harvey*, *ante*, p. 115; *Elevator Co. v. M. & C. R. R. Co.*, 85 Tenn., 705; *Mallory v. Oil Works*, 86 Tenn., 598.

The rule, and the foundation upon which it rests, as held by the English Courts, is identical with our own. The English doctrine is summarized by Mr. Beach in these words: “Corporations are created for fixed purposes, with certain specified powers. It is deemed to be public policy to keep them strictly within bounds so defined. There is an implied prohibition to go beyond such limits,

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and all persons dealing with a corporation are charged with notice of the limitations upon its authority. Therefore, every contract of a corporation or its agents, which exceeds the powers of the corporation, violates this implied prohibition, and contravenes such public policy, and is illegal and void. Consequently, as to such contracts, there can be no ratification or estoppel." 2 Beach on Private Corporations, Sec. 421. The Tennessee rule is in accord with the holding of many of the American Courts. *Pittsburg Ry. Co. v. Keokuk Bridge Co.*, 131 U. S., 389; *Central Transportation Co. v. Pullman Co.*, 139 U. S., 60; *Davis v. Old Colony R. R. Co.*, 131 Mass., 258; *Chambers v. Falkner*, 65 Ala., 448; *Marion Savings Bank v. Dunkin*, 54 Ala., 471.

The remedy, in case one of the parties has received a benefit under such a contract, which, *ex aequo et bono*, it ought not to retain, is a suit in disaffirmance and for an accounting. *Buckeye Marble Co. v. Harvey, supra*.

The plaintiff's suit is upon the contract, and in affirmation of it, and, if there be nothing else in the case, could not be maintained.

But is the defendant company, for any reason, estopped to show that this amendment had not been adopted? The provisions of the Act of 1875, concerning legislative amendments of charters obtained under the general law, is in these words: "The right is reserved to repeal, annul, or modify this charter. If it is repealed, or if the amend-

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ments proposed, being not merely auxiliary but fundamental, are rejected by a vote representing more than half of the stock, the corporation shall continue to exist, for the purpose of winding up its affairs, but not to enter upon any new business. If the amendments or modifications, being fundamental, are accepted by the corporation as aforesaid in a general meeting to be called for that purpose, any minor, married woman, or other person under disability, or any stockholder not agreeing to the acceptance of the modification, shall cease to be a share-holder, and the corporation shall be liable to pay said withdrawing stockholders the par value of their stock, if it is worth so much; if not, then so much as may be its real value in the market on the day of the withdrawal of said stockholders as aforesaid; *Provided*, That the claims of all creditors are to be paid in preference to said withdrawing stockholders." Acts of 1875, p. 237, Sec. 5.

It is to be observed that the State does not by this Act undertake to arbitrarily impose a fundamental alteration, and require the corporation to continue in business under the amendment. It does, however, demand that the corporation shall accept the amendment, however radical it may be, or continue its existence only for the purpose of winding up its business. In other words, the State says to every corporation to be organized under this law, "I reserve the right to repeal or amend this charter at any time. If the amend-

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ment I shall propose is vital and fundamental, it shall be submitted to the action of the stockholders. If a majority assent to it, and adopt it, then the corporation may continue in business. If there be any who are incapable of consenting, or any unwilling to accept, then all such share-holders shall cease to be share-holders, and the corporation shall be liable for the market value of all such shares. But if the amendment be unacceptable to a majority, then you shall exist only for the purpose of winding up your business, and shall have no power to enter upon any new contracts."

Under this Act, if the alteration be fundamental, the corporation must do one of two things—accept the offered amendment, or wind up.

The defendant says that it did neither. The law conclusively presumes that every officer, agent, and stockholder of this company knows the general law of the State affecting its powers and its business. The corporation, regarded as an entity, must be taken to have known of the right reserved by the State to amend its charter. This right was written in its very face. It must be taken to have known that the State, by the Act of 1889, had proposed an amendment. It must be taken to have known that it must accept this added power or it must cease to do business. It knew that every such corporation which should thereafter be found engaged in the doing of new business would be regarded by all who dealt with it as having all the powers conferred by the Act of

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1875, and the amendment of 1889. An act or contract within the scope of either of these general laws of the State was an act or contract within the apparent scope of the powers of any such company. All who deal with a corporation are bound to take notice of the limitations contained within the law of its creation. Mor. on Corp., Sec. 592; Beach on Corp., Sec. 383. But when an act or contract is within the apparent scope of its charter, and the defect in power depends upon some extrinsic fact peculiarly within the knowledge of the officers and agents of the corporation, and is unknown to the person so dealing, then there is no presumption of a participation in doing the illegal act, and a different rule of responsibility applies from that enforced when the defect is apparent upon a comparison of the contract with the charter. To illustrate:

"If a person deal with an agent of a corporation within the scope of his apparent authority, and without notice of the non-performance of any formality prescribed by the charter or by-laws as a condition precedent to the agent's authority to act, he will be entitled to assume that the formality has been complied with, and the corporation will be estopped from showing that the agent had no authority to bind it by reason of a failure to comply with the prescribed condition." Mor. on Corp., Sec. 610, 686.

Thus, as against *bona fide* holders, a corporation was held estopped to show that its bonds were

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invalid because issued, and mortgage executed, under resolutions of a board of directors held in a State other than that in which the corporation dealt. The purchaser of such bonds was held to be under no obligation to examine the minutes of the directory to see where it sat when the mortgage was authorized. *Galveston Railroad v. Cowdrey*, 11 Wall., 459.

So, when the power is given to a county to issue bonds upon terms prescribed in the Act, and the duty of determining when the conditions have been complied with is imposed upon certain officers or a particular Court, and the bonds are afterwards issued, and recite upon their face that these conditions have been complied with, the county is estopped from setting up any irregularities in their issue, and contrary to the recital on the bonds, as between it and an innocent purchaser. *Nelson v. Haywood County*, 3 Pickle, 781; *Town of Cohoma v. Eaves*, 92 U. S., 484.

The case of the *Royal British Bank v. Turquand*, 6 El. & Bl., 327, is in point. The directors, by the charter, called the deed of settlement, were only authorized to borrow money upon obtaining a resolution at a general meeting of the company. The directors having borrowed, without such a resolution, from one who loaned in good faith, on suit, the bank was held liable.

Jervis, C. J., said: "We may take it for granted that the dealings with these companies are not like dealings with other partnerships, and that the par-

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ties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more; and the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done."

To the same effect is the case *In re County Life Ass. Co.*, L. R., 5 Ch. App., 293. In that case Gifford, L. J., said: "A stranger must be taken to have read the general Act under which the company is incorporated, and also to have read the articles of association; but he is not to be taken to have read any thing more, and, if he knows nothing to the contrary, he has a right to assume, as against the company, that all matters of internal management have been duly complied with."

The well-known general rule applicable to one dealing with a company purporting to be a corporation seems to be applicable where the inquiry is as to whether an amendment has or has not been accepted, and the company, by acts of user, has represented itself as having the power conferred by the amendment. That rule is, that as against all persons who have entered into contracts with bodies assuming to act in a corporate capacity, it is sufficient for such bodies to show themselves to be corporations *de facto*.

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This Court, in *Merriman v. Magiveny*, 12 Heis. 497, said, "that in a proceeding between such corporations and an individual who has dealt with it, irregularities in its organization which might give the State the right to proceed by *quo warranto*, or other like proceeding, to have the charter declared void, cannot be taken advantage of." See, to same effect, 19 N. Y., 482, and 26 N. Y., 75.

So in Alabama, where the rule concerning the defense of *ultra vires* is identical with our own, it has been held that "if one contract with a corporation in a matter within its corporate power, the mere making of the contract estops the promisor from disputing the corporation's regular and complete organization." *Lehmon v. Warner*, 61 Ala., 465. In the later case of *Sherwood v. Alvis*, 83 Ala., 118, Stone, C. J., said: "The distinction is between the entire absence of authority in the organic law itself and a failure to comply with some prerequisite which the law has made a condition precedent to the exercise of corporate functions. In the one case there is a want of power, and in the other only an abuse of power conferred."

Let us apply this principle to the case in hand. One dealing with this corporation is bound to take notice of the statute and its amendments under which it was doing business. He was not bound to go any further. When he found this company engaging in new business after the amendment of its charter under the Act of 1889, he was bound

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to look to the limitations upon its powers contained in this amendment; for, finding it using the powers therein conferred, he had a right to presume that its stockholders had adopted this amendment. The question as to whether a stockholders' meeting had been held, and whether a majority of the stock had been voted for the amendment, were questions of internal management peculiarly within the knowledge of its officers and agents, and as to which it is conceded he had no knowledge. The making of the contract involved was a representation, as was the fact of its continuance in business, by these officers and agents that such a meeting had been held, and that a majority of the stock had accepted the offered power necessary to justify the making of the contract.

"If a portion of the share-holders undertake to accept a new charter or to adopt new articles of association on behalf of the whole company, their acts may be ratified by the remaining members of the company, and ratification may be implied from mere acquiescence or a neglect on the part of the dissenting share-holders to restrain the company from departing from its original constitution." Mor. on Corp., Sec. 623.

Ratification by all the share-holders of an act void as in excess of the powers of the company, under any circumstances, would not effectually charge the corporation. But when the question is, as here, as to the adoption or non-adoption by share-holders of an amendment to the charter, and

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the officers and agents have been suffered to use the power, very slight evidence would be sufficient to amount to evidence of acceptance by the share-holders. Certainly the contract in question was within the apparent scope of the power of this company, and a stranger, in good faith dealing with it, had a right to assume that the necessary steps had been taken to accept the power its officers were assuming to have, and the company must be held estopped to show that a majority of its share-holders had not accepted it.

Was this amendment fundamental, or merely auxiliary? The Act does not, and in the nature of the question could not, define the two classes of amendments. With respect to the distinction between the two classes of amendments we must look to the common law for the principles which distinguish them. Whether the Act is to be construed as arbitrarily imposing amendments not fundamental, or as requiring their acceptance by a majority of the corporation, or by the directors, as is admissible upon some of the authorities, it is not necessary for us to determine.

With reference to what are auxiliary amendments, the cases seem in hopeless conflict. There are cases going so far as to hold that any alteration, no matter how immaterial, which in any way affects the contract between the corporation and its stockholders is to be regarded as fundamental. The case of *Zabriskie v. Hackensack*, 18 N. J. Eq., 185, is a leading case for this doctrine. See also Potter

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on Corp., Secs. 40, 41. But the weight of authority seems to sustain a more moderate and reasonable view, and to support the doctrine that if the amendment does not change the character of the business, and simply authorizes its reasonable extension upon the lines of the original project, that a majority of the corporators, and in some instances the directors alone, may accept and conclude all the stockholders by their action. The cases are arrayed upon this view by a very late and learned author, and need not be here considered. Beach on Corporations, Sec. 42.

In view of the consequences imposed by our Act, when an amendment is proposed, both to the corporation itself as well as to stockholders incapable of consenting, it would seem to be the sounder rule that only very material amendments, radical and vital in their character, should be regarded as requiring unanimous adoption.

In the view we take of the case in hand, it is unnecessary to decide whether the amendment proposed by the Act of 1889 was fundamental or only auxiliary. For the purposes of this case, we have assumed it to have been fundamental, and, hence, to require the unanimous consent of all who should continue share-holders, this being the position assumed by the learned counsel for the defendant corporation.

The next defense presented is that the plaintiff's injury resulted "from voluntary exposure to unnecessary danger."

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Injuries resulting from such exposure are expressly excluded from indemnity by one of the conditions of the policy. We do not think these words the entire equivalent of ordinary negligence. A degree of consciousness of danger is necessary before there would be that voluntary exposure to unnecessary danger required to prevent indemnity. We do not think the mere fact of the cleaning of a gun, not known to be loaded, is such voluntary exposure as the contract contemplated. The accident seems to have resulted from a defect in the gun, unknown to plaintiff, whereby it was possible to discharge it by striking its butt upon the floor.

Judgment reversed, and judgment here according to the declaration, with costs.

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M. E. CHURCH, SOUTH, v. HINTON.

(*Nashville*. February 2, 1893.)

1. TAXATION. *Exemptions for charitable and religious purposes.*

The personal property of an incorporated publishing house, used in conducting its business, is exempt from *ad valorem* taxation under our Constitution and statutes exempting from taxation property held and used for purposes "purely" or "exclusively" religious, charitable, scientific, literary, or educational, where the corporation was placed by its charter under complete control of an unincorporated religious society or denomination, whose discipline provided that the entire net income arising from the business of the corporation, consisting mainly of the publication and distribution of religious literature, should be applied exclusively to the benefit of the traveling, supernumerary, superannuated, and worn-out preachers of such religious denomination, their wives, widows, and children.

Constitution construed: Art. II., Sec. 28.

Act construed: Acts 1889, Ch. 96, Sec. 2, Subsec. 2.

2. SAME. *Same. Secular use of property.*

But this exemption does not attach to property not separable in its use, e. g., the outfit of a publishing house, if it has been diverted to secular purposes to any material extent, e. g., the one-fifty-sixth part of its use.

3. SAME. *Same. Same.*

But this exemption is not defeated by the use of the property, viz.: The outfit of the publishing house, in printing in part secular books, etc., if the entire net proceeds of the business is applied to the religious and charitable purposes provided in the charter and discipline.

Cases cited and approved: *Nashville v. Smith*, 86 Tenn., 213; *Smith v. Nashville*, 88 Tenn., 467; *University of the South v. Skidmore*, 87 Tenn., 156; *State v. Fisk University*, 87 Tenn., 241.

4. CHARITIES. *What are.*

Property or its proceeds is devoted to a religious or charitable purpose where it is set apart entirely and exclusively for the benefit of traveling,

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supernumerary, superannuated, and worn-out preachers, their wives, widows, and orphans.

Cases cited and approved: Franklin *v.* Armfield, 2 Sneed, 305; Hornberger *v.* Hornberger, 12 Heis., 635; Dickson *v.* Montgomery, 1 Swan, 367; Gass *v.* Ross, 3 Sneed, 211; Young *v.* Shumate, 3 Sneed, 369.

FROM DAVIDSON.

Appeal from Circuit Court of Davidson County.

W. K. McALISTER, J.

W. T. TURLEY and PITTS & MEEKS for M. E. Church, South.

Attorney-general PICKLE and W. D. COVINGTON, for Hinton.

WILKES, J. The plaintiff is a body-corporate, doing business at Nashville, Tenn. An *ad valorem* tax was assessed upon its personal property, for State purposes, for the year 1890, at a valuation of \$40,000.

The tax was paid under protest February 28, 1891, amounting to \$120. Within thirty days thereafter this action was brought to recover the amount paid, on the ground that the plaintiff was a corporation created and its property used purely and exclusively for religious and charitable purposes, and hence exempt from taxation under the Constitution and Act of the Legislature.

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The Court below, Hon. W. K. McAlister, Judge, heard the case upon an agreed statement of facts, without the intervention of a jury, and, being of opinion that the tax was properly laid and collected, denied the plaintiff any relief, and dismissed the suit, from which judgment the plaintiff appealed.

It is the policy of the State, and but justice between its citizens, that all property shall be taxed, and that no property shall escape this common burden, unless it comes fairly within the exemption; and it is incumbent on the plaintiff to show that it comes within the exempting clauses of the Constitution and statute.

This Court has said in the case of *The State v. Fisk University*, 3 Pickle, 241: "The intention of the Legislature must govern in ascertaining the extent of tax exemptions; and when the exemption is to religious, scientific, literary, and educational institutions, the same strict construction will not be indulged in that would be applied to corporations created and operated for private gain or profit."

The fundamental ground upon which all such exemptions are based is a benefit conferred upon the public by such institutions, and a consequent relief to some extent of the burden upon the State to care for and advance the interests of its citizens.

The Constitution, Article II., Section 28, provides that "all property, real, personal, and mixed, shall be taxed, but the Legislature may except such as

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may be held by the State, by counties, cities, and towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary, or educational," etc.

The Act of 1889, Chapter 96, Section 2, Sub-section 2, under which this tax was assessed, exempts all property belonging to any religious, charitable, scientific, literary, or educational institution used exclusively for the purposes for which said institution was created.

The terms "purely," as used in the Constitution, and "exclusively," as used in the statute, are synonymous, and mean that the property must be used wholly and entirely for such charitable and religious purposes, and exclude entirely the idea of any individual gain or profit, or, indeed, of any corporate profit, unless it is used purely for such religious and charitable purposes.

The important question raised in the case, and set out in the assignment of errors is, Was this institution purely religious and charitable in its purposes, and was the property assessed held and used exclusively for such purposes when this tax was laid?

The question is an important one, not so much on account of the amount, as of the principle involved.

The plaintiff was chartered by Chapter 136 of the Acts of 1855-6. The first section provides that "Edward Stephenson and Francis A. Owen,

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and their successors in office, be, and they are hereby, made a body-corporate and politic, under the name and style of the 'Book Agents of the Methodist Episcopal Church, South;' and by that name and style to have perpetual succession for the manufacture and distribution of books; tracts, periodicals, etc., with power to sue and be sued, to hold personal and real estate, and to sell and dispose of the same as they may deem best for the interests involved."

The second section provides that the corporation shall now, and at all times hereafter, be under the control of the Methodist Episcopal Church, South, according to the laws and usages of the same as contained in their present or any future edition of their discipline.

Looking to this book of discipline, it appears, Section 229, that the object or purpose of the institution shall be to advance the cause of Christianity by disseminating religious knowledge and useful literary and scientific information in the form of books, tracts, periodicals, etc.

It is put under the control of the general book agent, and a book committee elected by the General Conference. This General Conference has power to make rules and regulations for the Church, under certain restrictions and limitations, among which is the sixth restriction rule, as follows:

"The General Conference shall not appropriate the produce of the publishing house [referring to

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the plaintiff], to any purpose other than for the benefit of the traveling, supernumerary, superannuated, and worn-out preachers, their wives, widows, and children."

These provisions of the discipline, taken in connection with the charter, fix and define the purposes of the institution, and constitute its foundation. It is clear from its charter and discipline that this book concern, or publishing house, was to be used as an arm or agency of the Methodist Church in the publication and distribution of books, periodicals, and in the support of the preachers mentioned, together with their wives, widows, and children.

The volume of business done by the publishing house in 1890 was \$336,800, of which about one-fifty-sixth, or \$6,000, was derived from what in the agreed statement of facts is called "secular work"—that is, the printing of secular books, hand-bills, letter-heads, etc. Some of this secular work was done in the job office, and some by the other machinery in the house. It was not sought, but was done when offered, and plaintiff stood ready and willing to do any such work.

It is further agreed that all the net income or produce of the house derived from every source has been always heretofore, and was being when this tax was assessed, applied for the benefit of the persons named and described in the discipline.

It is insisted by plaintiff that the doing of this secular work was a mere incident, and that if the

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property was thus made liable to tax, then there would have been an apportionment of values so as to allow exemption to so much of the value as the privileged portion represented, and, at most, the tax would have been only to the extent of the volume of the secular work compared to the entire volume of business done.

We cannot take this view. It seems that the entire property was used in doing this secular work, and, if it thereby becomes liable to any extent, the whole of it is liable.

It is not a case where the property is separable, as when several buildings belong to the same institution, one of which is used for secular purposes, and the other for purely religious or charitable purposes, and it can then be ascertained what part of the property has been used for secular purposes.

We come, therefore, to the controlling questions: (1) Whether this institution is purely religious and charitable in its purposes; and (2) whether its property has been exclusively used for the religious and charitable purposes of its creation.

The books are full of decisions showing what are and what are not charities, but a few illustrations must suffice. It is held that "gifts for the advancement of Christianity among the heathen, or for the dissemination of the gospel, or for the benefit of the ministers of the gospel, are good charities. Bispham's Equity, Secs. 112 and 119. So also is "money given to maintain a preaching

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minister." Story's Eq. Juris., Sec. 1164. Gifts for the benefit of ministers of the gospel are charities. Perry on Trusts, p. 701. A gift to educate, board, and clothe the children of the donor's brothers and sisters, and their descendants, is a charity (2 Sneed, 305); or for the education of the poor children of Sumner County (2 Sneed, 305; 12 Heis., 635); or to educate indigent young men preparing for the ministry (1 Swan, 367); or for schooling the children in the bounds of Gass school-district forever (3 Sneed, 211); or for home or foreign missions (3 Sneed, 369).

There is a material difference between charitable and business corporations. In the former there are no stockholders, and there is no element of individual gain or profit, but a public trust.

In 2 Morawetz on Corporations, Sec. 1046, it is said: "The charter of a charitable corporation, like that of a business corporation, operates principally as a law enabling the members of a corporation to accomplish legally the purposes for which they have united. But it does not embody a contract between the corporators like the charter of a business corporation. It rather embodies a declaration of a trust—namely, the trust assumed by the corporation in respect of the funds contributed to it."

It clearly appears that this corporation was created as an arm or agency of the Methodist Church, a religious organization charged with the trust of manufacturing and distributing books, periodicals,

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etc., in the interest and under the auspices of that Church, and thereby raising a fund with which to support its worn-out preachers and their families. Such being the purposes of its creation, it is clearly a religious and charitable institution.

But another question remains. Has its property been held and used purely and exclusively for the purposes of its creation, and in accordance with these trusts? A short review of our decisions may aid us in arriving at a proper conclusion on the facts of this case. In the case of *The City of Nashville v. Smith*, 2 Pickle, 213, and of *Smith v. Nashville*, 4 Pickle, 467, this Court considered the question whether the city of Nashville was subject to the privilege tax imposed by the Act of 1887 upon the business of a water company. This Court held that a municipal corporation owning and operating water-works exclusively for corporation or public purposes was within the constitutional and legislative provisions; and it did not matter whether the water was furnished free or not, and that raising a fund to pay running expenses and to keep down interest upon a debt created for their erection by a sale of the water to the citizens, did not deprive it of its right to exemption. It appeared in the proof that the city had furnished water to factories located beyond the city limits, and to persons residing outside the corporate limits; but what effect this would have upon the exemption was not determined, be-

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cause not raised by the pleadings, and for other reasons stated in the opinion.

In the case of the *University of the South v. Skidmore*, 3 Pickle, 156, the exemption to the University of the South, an educational institution, was considered in an able opinion by special Judge East. In that case, however, the exemption was based upon a provision of a charter granted before the Constitution of 1870 was adopted, and turned upon the *title* to the property rather than its use. The lands belonging to the University had been laid off into lots and streets, and leased for a term of years, with renewal option, and the town of Sewanee, consisting of several hundred houses, had been built upon the grounds. From these leases a yearly rental or income of \$1,200 or \$1,500 was realized and used for the purposes of the University. It was insisted that this use of the property was not contemplated by the Legislature, and leasing the property was such a parting with the title as would subject it to taxation.

The Court said: "Certainly the Legislature did not intend that the land should remain of no positive utility to its owners. The only value of the land consists in its use and adaptation. We cannot concur in the argument that the effort of this corporation to utilize its land, by leasing or renting, and thus make it subservient to the chief end and purpose of the corporation, deprives it of the exemption given by the State for the encouragement of such institution."

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The case of *The State v. Fisk University*, 3 Pickle, 233, presents these facts: Fisk University, a chartered institution of learning, purchased as its permanent site three separate blocks of land, near Nashville, containing six or eight acres each, and separated by streets. On the northern and southern blocks extensive college buildings were erected. The middle block was vacant, except two small buildings were upon one corner of it, and used for school-purposes. On another part of the lot barns and stables were erected. On the vacant portion of the lot corn, hay, and vegetables were raised year after year. Pupils of the school were engaged in raising these products, and received pay for their work in board and tuition, but the school was not in any sense an agricultural school or founded for that purpose. The hay and corn were fed to stock belonging to or connected with the institution, and the vegetables were consumed in the mess-halls. The middle or vacant lot was assessed for taxes, and they were collected under a statute which provided for the exemption of property belonging to an educational institution which is actually used for the purposes for which the institution was created.

This Court held that the exemption could not be restricted simply to such property as was actually used in *education*, for that would embrace only buildings, desks, and books, and would exclude grounds, walks, play-grounds, gymnasium, infirmary, or hospital buildings for the pupils, all of which

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were necessary, and owned exclusively for school-purposes, but not actually used in education.

We have examined the decisions of the Courts of Texas, Georgia, Ohio, Illinois, Iowa, Massachusetts, and New Jersey, and find an irreconcilable conflict if not confusion of cases; but, owing to differences between the constitutional and statutory provisions of the several States and our own, they can have but little weight with us, and we must decide the case under the provisions of our own Constitution and statutes.

We are of opinion that it is too narrow a view to hold that the direct, immediate, physical use of the property of a religious or charitable institution, *in its religious and charitable work*, is essential to the exemption. Such construction would destroy the exemption in this case, even if the plaintiff had not engaged in secular work, inasmuch as it would limit the institution to the manufacture and distribution of books, etc., excluding the idea of any sale after they are manufactured with a view to realizing a profit or income which could be devoted to the benefit of the preachers, their wives, widows, and children.

These worthy persons could not subsist upon the publications, for they are neither food, shelter, nor clothing, and it is only by a sale or exchange that these necessaries could be afforded. Such a construction would require the house to engage in the production of food and the manufacture of clothing and building of houses, so that these

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worthy people might be benefited by their actual physical use, or one of the main purposes of its creation would be thwarted.

Applying the same rule of construction to any of our educational or religious charities, and it would follow that the endowment fund of a college, or the sustentation fund of any church or public library, must remain unproductive, because to invest such fund in stocks or bonds, or in property producing an income, would be to engage in a secular or business occupation foreign to the purposes of its creation, and we must therefore limit the use of such fund to its simple consumption in the immediate uses of the institution. The support of none of these institutions can be had except by the use of money. Money cannot be made except by labor; and this labor is always more or less tinged with a secular character. Even the printing of the Bible or other religious books is a secular or business occupation, especially if they are to be sold. The case of *The University v. The People*, 99 U. S., is instructive on this point of the immediate use of the property.

Mr. Justice Miller, in construing the provision of the Constitution of Illinois, makes a broad distinction between property necessary for school-purposes and property used for schools. The Constitution of Illinois provided that the Legislature might exempt from taxation such property as might be deemed necessary for school-purposes.

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The Judge said: "We think the distinction very broad between property contributing to the purposes of a school—made to aid in the education of persons in that school—and that which is directly and immediately subjected to use in the school. The purposes of a school and the school itself are not identical. The purpose of a college or university is to give youth an education. The money which comes from the sale or rent of land dedicated to that object aids this purpose; and land so held or leased is held for school-purposes in the fullest and clearest sense."

The purposes of this corporation are twofold—to publish and distribute books, etc., and therefrom to raise money to support these most worthy objects of Christian charity. We need not inquire which is the primary and which the secondary purpose. Both are indissolubly interwoven in the foundation of this institution, and the former is but a means of accomplishing the latter.

Even if we concede that the work done could not strictly be called religious, still the proceeds therefrom are wholly devoted to the charitable purposes contemplated in the creation of the institution, and the work done cannot be considered immoral or at variance with the religious feature of the institution.

It is said there are dangers to society likely to result in so holding; that a line must be drawn somewhere; that such institutions may become too rich and powerful, and menace society. In answer

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to this, we say the field of charity is large, and is not likely to be overcrowded, unless some element of personal gain enters into the enterprise. Besides, no fund can ever accumulate from the operation of this institution, as the income, so soon as earned, is impressed with a direct trust in favor of this charity, which can be enforced at once; and again, if necessary, the Legislature can, if deemed important, limit the exemption in amount.

It is said, also, that evil-minded persons may adopt the plan of obtaining charters for religious and charitable purposes in order to enrich themselves. A sufficient answer to this is, that it is agreed in this case that the proceeds have all the while been properly applied. If they are diverted to other purposes, then will be the time to lay the hand of the law upon it, and not only make it contribute to the common burden of taxation, but force it, it may be, to surrender its charter, used as a cloak for such fraudulent purposes.

It is said, also, that the great body of the Methodist people may change their organic law, and devote the proceeds of this house to other purposes. This is so; and, if it is done, then the question will arise under the change.

A sufficient answer to this is that it is agreed they have not done so, but for over thirty years the income has been devoted as was originally designed.

Again, it is said this doing of secular work will bring this religious charitable institution in

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competition with those who must pay taxes; but an answer to this is that it is not the presence or absence of competition which furnishes the test, but the benefit extended to the public and fidelity to the purposes of its creation. This competition will arise whether work done is secular or religious. If nothing but religious books were published, and then distributed gratuitously, still the competition would exist from the fact that the demand for such books would, to that extent, be diminished. So with schools. If it were not for charitable schools, private and pay schools for individual profit would receive that much more patronage.

We are of opinion that the plaintiff is an institution created for both religious and charitable purposes; that the ultimate use of its property has been in accordance with these purposes; that the income and profit derived from the use of its property has been exclusively applied to religious and charitable purposes, and hence it is entitled to exemption under the provisions of the Constitution and Act; and we therefore reverse the judgment of the Court below, and give judgment here for the amounts of the tax paid, with interest and all costs.

DISSENTING OPINION.

SNODGRASS, J. I cannot agree with the majority of the Court in holding this property of the corporation exempt from taxation. I do not question

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the wise and beneficent purpose for which the corporation was promoted by the great religious body which now controls it, and which is a voluntary, unincorporated association; but I deny the power of the Legislature to create a corporation and put it under the control of a voluntary, unincorporated association. I think so much of the Act of incorporation as purports to do so is invalid, and that it results that the corporation created is purely a business one. As such, it is not even created for the publication and dissemination of purely religious books or literature, or to do purely religious printing or publishing. On the contrary, it is not even intimated in the corporate Act proper that it is for such purpose; and this cannot be implied from any reference to the character of its publications as authorized, except from the use of the word "tracts" employed in the Act.

The word does not admit of limitation to religious tracts, because it has no such restricted meaning. There are, it is true, religious tracts; but there are also political and other tracts; and the use of this word no more determines the religious character of its publications than does the word "books" determine that its publications shall be religious books. Besides, it is not insisted that the work of the corporation is confined to religious printing or publishing; and, in fact, it does not so limit its own work.

Further, I think it is not the purpose of the

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Constitution or the exemption Act to make the exemption depend upon the purpose to which the fund raised in a business corporation or a business enterprise purports to be devoted. If so, any business enterprise may be organized, and, purporting to be an agency or auxiliary of a religious, literary, educational, scientific, or charitable institution, run free from taxation, in competition with other like institutions; and so, finally, all business in the State might be run, as competition by taxed enterprises would be driven out.

Take this illustration: A body of men desire to run a business without tax. They organize a school corporation, and then a business association, the proceeds of which they agree is to be devoted to the school purpose. The business which they organize may be a printing and publishing establishment, or any other industrial establishment, or a mercantile store. It is owned by them, and they are the corporators of the school. Their business goes tax free, and, as a school corporation, they take its proceeds. This would be a bad faith use of the law; but in strictly good faith every church, school, literary, scientific, and charitable institution may each establish any business, or number of businesses it pleases, and run them tax free if their earnings are devoted to the uses of the institution organizing it. This would put all taxed businesses in competition with these untaxed enterprises. It cannot be that any such thing was in contemplation of the framers of this

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clause of the Constitution. They must have intended the exemptions to apply to actual physical holding and use for strict necessary purposes of the holders. Thus construed, the exemption is beneficial to them and harmless to the public, and I think this construction should be given to it.

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(Nashville. February 7, 1893.)

1. MASTER AND SERVANT. *Servant's acts admissible in evidence against master, when.*

Brakeman sued railroad company for personal injuries sustained in its service by reason of the company's negligent failure to provide safe "foot-rest" and "hand-hold" for ascending to brakes on top of car. The defense was plaintiff's contributory negligence, which was supported by proof that he knew of the defects that caused the injury and still continued in service. The plaintiff, in rebuttal of this defense, was permitted to prove, over defendant's objection, that he made complaint to the conductor of the train in regard to said defects, and received of him assurance that they should be remedied.

Held: There is no error in the admission of this evidence in rebuttal.

2. SAME. Same. Contributory negligence rebutted.

And it is a complete answer to such charge of contributory negligence that the brakeman complained of the defects in question to the conductor in charge of the train, and received his assurance that necessary repairs should be made, and that he remained in the company's service in consequence of that assurance. The conductor of a train, though not authorized to make repairs, bears the relation of vice-principal to the brakemen on his train, and his knowledge of defects in the cars composing his train, and promise to repair them, are binding upon the company.

Cases cited and approved: Railroad *v.* Wheless, 10 Lea, 747; Railroad *v.* Collins, 85 Tenn., 227; Railroad *v.* Bowler, 9 Heis., 870; Guthrie *v.* Railroad, 11 Lea, 372; Elliott *v.* Railroad, 1 Cold., 618.

3. SAME. Same. Rule construed.

Brakemen are not required to make complaint of known defects in cars to the master of trains, and not to their conductor, under a rule of the company in these words: "Conductors, flagmen, brakemen, and train-porters to report to, and receive their instructions from, the master of trains." This rule has no application to complaints about defective appliances.

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4. SAME. *Correct charge as to master's liability to servant injured by defective appliances.*

The Court's charge upon the leading features of this case is quoted in the opinion, and pronounced a "clear, pointed, and sound exposition of the law."

Cases cited and approved: Railroad *v.* Duffield, 12 Lea, 63; 100 U. S., 213; 128 U. S., 91.

5. SAME. *Omissions in not cause for reversal, when.*

If the Court's charge upon the main features of the case is full and accurate, there will be no reversal for Court's failure to charge upon minor or collateral matters, where no requests have been made for additional instructions upon the omitted points, unless it appears that the failure to charge upon a particular aspect of the case is equivalent, under the circumstances, to an affirmatively erroneous charge.

6. NEGLIGENCE. *Proximate cause. Concurrent acts of different persons.*

In suit by brakeman against railroad company for personal injuries, there was evidence tending to show that he sustained his injuries by reason of the company's negligence in failing to supply safe "foot-rest" for ascending to brakes on top of car. There was also evidence tending to show that the injuries resulted from the engineer's negligence in causing a sudden jam of the cars as the brakeman was in the act of ascending the car by means of the defective "foot-rest."

Held: The Court charged correctly, upon these facts, that plaintiff could not recover if the engineer's negligence was the cause of the injury—he being a fellow-servant. But that plaintiff was entitled to recover, notwithstanding the engineer's negligence, if the defective "foot-rest" was the proximate cause of the injury.

7. ASSIGNMENT OF ERRORS. *Insufficient, when.*

Assignment of error in a law cause averring that "the testimony greatly preponderates against the finding of the jury" is insufficient in law.

This Court will not set aside a verdict, in any case, for the reason assigned.

DAVIDSON COUNTY.

Appeal from Circuit Court of Davidson County.
W. K. McALISTER, J.

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BAXTER SMITH and J. S. PILCHER for Railroad.

STEGER, WASHINGTON & JACKSON for Kenley.

LURTON, C. J. The defendant in error, while in the discharge of his duty as a brakeman, in the employment of the railroad company, sustained a serious injury, by which he lost an arm. He has recovered a judgment against the company, from which it has appealed. Many errors have been assigned, some of which will be disposed of orally, as involving no point requiring a written opinion. The negligence of the company was in an alleged defective "foot-rest" and "hand-hold," being appliances furnished by the company to aid brakemen in safely ascending to the brakes on the top of the caboose-car.

The first and second assignments are in effect the same. They assign as error the ruling of the Circuit Judge in permitting, over objection, evidence that the plaintiff had made complaint to the conductor of the train in which this car was placed, and upon which plaintiff was braking. The substance of the objection advanced against this evidence was, that the conductor had no power or agency in the construction or repairing of cars, and that he has only charge and control of the train as delivered to him from the time it is put in his charge until it arrives at its destination; that he has nothing to do with cars put into his train, but must take them just as they are turned

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over to him. We think this evidence was competent. The relation of "master and servant," "superior and inferior," exists between the conductor of a train and his subordinates engaged in the running and management of it.

The rule is well settled in this State that "the master is liable for injuries resulting to one servant from the negligence of another servant who is the immediate superior of the first."

"The rule," says Judge Cooper, "is based not upon the idea of the relative rank of the two servants, or the general superiority of the one in position, intelligence, skill, or in the wages received, but upon the ground that the one is placed under the orders and direction of the other, and required to submit to and obey such orders in the performance of his duties; that the *inferior* is placed in the position of a servant to the *superior*. In such cases, the superior is held to represent the master." *Railroad v. Wheless*, 10 Lea, 747; *Railroad v. Collins*, 85 Tenn., 227.

Thus, a "section boss" was held the "superior," and to represent the master as to the laborers under him engaged in repairing the track, and the company held liable for an injury to such a section hand, resulting from the negligence of the "boss." *Railroad v. Bowler*, 9 Heis., 870.

A defective "maul" was furnished to a bridge carpenter by his section foreman, whereby the former was injured. The company was held liable for the negligence of the foreman, as standing for

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and representing the master. *Guthrie v. Railroad*, 11 Lea, 372.

When a corporation acts at all, it must act through agents. If one of these agents, with respect to other agents, stands as the superior and represents the master because of their subordination to him, it must follow, as matter of law, that, within the scope of this relationship, the knowledge of this vice-principal must be the knowledge of the common employer. This principle was applied in the early and leading case of *Elliott v. Railroad*, 1 Cold., 618. The plaintiff, Elliott, was employed on a locomotive-engine to pass wood from the tender back to the fireman. The engine was under the care and control of an engineer. It was one kept exclusively for pushing freight-trains up a very steep grade on the Cumberland Mountain. The engine was defective and unfit for the work in which it was engaged. By reason of this defect, it ran off the track, turned over, and injured the plaintiff. An important question in the case was as to the knowledge of the company as to the defective character of the engine and track. The trial Judge ruled that the knowledge of the engineer was imputed to the corporation.

The opinion was by McKinney, J., who said: "The established rule that notice to an agent in the transaction for which he is employed, and within the scope of the authority confided to him, is notice to the principal, applies equally to a cor-

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poration as to a natural person. In general, the only mode in which a corporation aggregate can act is through the intervention of agents, either specially designated by the act of the incorporation or appointed and authorized by the corporation in pursuance of it. And the corporation is responsible for the acts of the agent; and, of necessity, the knowledge of a fact by that agent, directly connected with the duties of the business confided to his care, must be chargeable to the corporation."

It is proper, in this connection, to consider the sixth, seventh, and eighth assignments of error. The company had introduced in evidence certain rules promulgated for the government of its employes. Rule 132 was in these words:

"Conductors, flagmen, brakemen, and train porters report to, and receive their instructions from, the master of trains."

The Court was requested to charge, and did charge, that certain rules which had been shown in evidence, including the rule just quoted, would be reasonable; "and that if the plaintiff failed to observe and obey the same, and was injured in consequence of said failure, or if his failure to observe the same was the proximate cause, or materially contributed to the accident, he cannot recover in this action."

In addition to this, he was asked to charge as follows: "That if, under a rule of defendant, in force at the time of the accident in question, it

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was the duty of brakemen to report to, and receive their instructions from, the master of trains; then, and in that case, if there was a defect in the steps or 'hand-hold' at the end or ends of the caboose in question, it was the duty of the plaintiff to have reported that fact to the master of trains, and that that would have been notice to the company, and that, under said rule, no one except the master of trains, would have been authorized or warranted in promising to repair the same, so that the plaintiff could rely on said promise, and continue to use the same, and be protected by such promise."

The trial Judge was also asked to charge "that a general rule of law is that, if a defect in a car exists, notice of the same must be brought home to a car-inspector, to be notice to the company, or that he had been negligent in not discovering it, or notice to the employes of the company having charge of the machinery of the company to repair same."

He was further asked to charge "that if plaintiff knew of the alleged defect in the step or foot-rest, then he cannot recover, unless he should affirmatively show by proof that he had complained either to Hartung, the car-repairer, or to the master of trains of the alleged defect, and the latter or one of them had agreed to repair or change it, and he had continued to work with the car, relying on such promise."

These several requests were refused. There was

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no error in this. So much as were sound had been sufficiently charged. We do not think Rule 132 had any reference to complaints concerning a defective appliance, as an unfit tool. Notice to the company was imputed by the notice or complaint made to the conductor. The promise of the latter to have the same repaired, or his statement that the car-repairer had promised to repair as soon as he could, and that it would be done very soon, was a sufficient assurance to justify the plaintiff in believing that the defect would be remedied within a reasonable time. That the conductor was not himself authorized to make the repair or alteration, is no valid objection. The conductor was the immediate superior of the plaintiff, and his assurance that the matter would be remedied is, in law, to be imputed to the master. As the vice-principal in charge of this train, and as to the crew operating the train, notice to him was notice to the master; and an assurance of remedy made upon complaint of his own subordinate, and in regard to an appliance upon his own train, was an act within the sphere of his duty toward his inferior.

The Court charged the jury as follows:

"The employer is bound to use all reasonable precautions for the safety of his employes, and must furnish such machinery and appliances as will be reasonably safe and suitable. If, however, the employe, after entering upon the service, discovers that an appliance is unsafe or

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unfit in any particular, and, notwithstanding such knowledge, voluntarily continues in the employment without objection or complaint, he is assumed to risk the danger thus known. To entitle the plaintiff to recover in this cause, he is called upon to establish the following propositions, to wit:

"*First.*—That the foot-rest was defective.

"*Second.*—That he made complaint to the company of the defect, and that the company promised to repair it.

"If you should find from the evidence that the foot-rest was deficient in dimensions, and was attached to the caboose at an angle of inclination, when it should have been put on horizontally, you will next inquire whether plaintiff made any complaint about it to the company, and whether the latter promised to remedy the defect. If Kenley complained of the defective foot-rest to Norman, the conductor of the train, who assured Kenley that the defect would be remedied, Kenley will not be presumed to have waived the defect by remaining for a reasonable length of time in the service, unless the danger of using the foot-rest was so obvious that no prudent man would have taken the risk; and what will constitute such reasonable length of time for the repairs to be made is a question for the determination of the jury. But if, after the expiration of a reasonable time, Kenley saw, or might have seen if he had taken the trouble to examine, that the foot-rest had not been remedied, and he nevertheless continued in

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the service, he is deemed to have accepted the risk of the danger, and the company will not be liable."

The error assigned upon this is in these words: "Because, as shown by the facts of this case, which are mentioned and cited in the foregoing statement, the principles of law declared were not applicable to this case. The Court, by this charge, rested the case upon the alleged defect in the foot-rest, whereas it was undisputed that the plaintiff had full knowledge of the alleged defect, and that there were present two other perfectly safe modes of ascending to the top of the train. Therefore, it was his own fault for plaintiff to have used the alleged defective foot-rest.

"The case before the Court was not one in which an employe, after knowledge of, and a request to repair a defective appliance, could continue in the employment of defendant for a reasonable length of time for repairs to be made, and it was error in the trial Judge to treat the case in that light."

The charge as delivered was clear, pointed, and a sound exposition of the law. *Hough v. Railway Company*, 100 U. S., 213; *Conroy v. Vulcan Iron Works*, 62 Mo., 35; *Belair v. Railroad*, 43 Iowa, 662; 14 Am. & Eng. Ency. of Law, 856; Wood on Master and Servant, 766.

There was evidence tending to show other ways of ascending to the top of this train. Whether these ways were safer or as convenient was a dis-

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puted fact. Neither is it clear that, if in the exigency of obeying a sudden command an employe uses a defective appliance, when a safer one was equally at his disposal, that he thereby voluntarily assumes the risk. *Kane v. Railway Company*, 128 U. S., 91; *Railroad v. Duffield*, 12 Lea, 63.

However this may be, the Circuit Judge was not requested to charge upon this aspect of the case. His charge was applicable to the chief point in controversy, and contains no affirmative error. He cannot be put in error under such circumstances, when his attention was not called to the defense now suggested. We cannot on this record say that his failure to charge upon an aspect of the case not called to his attention is equivalent to an affirmatively erroneous charge.

There was evidence tending to show that at the moment Kenley put his foot upon the defective foot-rest, to ascend to the top of the train, that there was a sudden jamming of the cars together, and that the injury was brought about by the concurrent negligence of the engineer in causing the jam, and of the company through the defective foot-rest.

The Circuit Judge, in substance, charged the jury that, if the proximate cause of the injury was the negligence of the engineer, plaintiff could not recover, as the engineer and brakeman were, in law, fellow-servants.

He also charged: "But if you find that the foot-rest, on account of its construction, was the

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proximate cause of the accident, then the company will be liable, notwithstanding the jam of the cars, provided you believe from the evidence that the injury would not have occurred had the foot-rest been in reasonably safe condition."

The error assigned is, "that the plaintiff was not entitled to recover, if the accident occurred as a result of the concurrent negligence of the engineer in jamming the train just as Kenley stepped on the foot-rest, and the alleged defective construction of the foot-rest."

The charge was fully as favorable as the railroad company was entitled to. The jury were distinctly told that they must find that the defective foot-rest was the proximate cause of the injury, and that they must find, "that the injury would not have occurred had the foot-rest been in a reasonably safe condition."

The rule, as stated by Mr. Thompson in his work upon negligence, concerning the concurrent negligence of a fellow-servant and of the master, is as follows:

"If the negligence of the master combines with the negligence of a fellow-servant, and the two contribute to the injury, the servant injured may recover damages of the master." 2 Thompson on Neg., 981.

The reason of the rule is obvious. The servant contracts to assume the dangers incident to the negligence of his fellow-servant, but he neither does nor can contract to assume the risk of the

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negligence of the master. Not agreeing to assume any part of the negligence of the master, if such negligence approximately contribute to his injury, he may recover, notwithstanding his injury was due to the combined negligence of the master and his fellow-servant. The cases so holding are numerous, and are cited by Mr. Thompson.

The fifteenth assignment is in these words: "The testimony greatly *preponderates* against the finding of the jury. See citations of evidence in statement of the case."

This assignment raises no question. It is immaterial, under the well-settled rule of this Court, that the evidence does "greatly preponderate against the verdict." Such preponderance will not justify us in setting aside the verdict of a jury. There was material evidence which, if believed by the jury, justified the result.

Judgment affirmed.

Green v. Williams.

GREEN v. WILLIAMS.

(Nashville. February 8, 1893.)

1. MECHANICS' LIEN. *Estoppel of contractor.*

A contractor is estopped to assert his mechanics' lien against the purchaser of the incumbered property, who was induced to purchase and pay for the property upon the contractor's representation that no such lien existed against it.

2. SAME. *Same. Subcontractors' and furnishers' liens independent of contractors.*

But such estoppel of the contractor is not operative against the rights or liens of subcontractors and material-men, who have, under contract with him, performed labor or furnished materials for the improvement of the incumbered property. Their liens for labor done and materials furnished are entirely independent of the contractor's lien, and not subject, to any extent, to his power or control.

3. SAME. *Purchaser's liability.*

A purchaser who becomes owner of the property during the progress of work thereon that fixes subcontractors' and furnishers' liens upon it, takes the property subject to liens for the full amounts due to such subcontractors and material-men upon completion of their contracts, although he had not actual notice of such claims, and there had not then been effected the registration and notice required by Acts 1889, Chapter 103; provided said liens are subsequently, and within the time allowed by said Act, perfected by notice and registration as therein prescribed.

Act construed: Act 1889, Ch. 103.

Cases cited and approved: Manufacturing Co. v. Falls, 90 Tenn., 471; Reeves v. Henderson, 90 Tenn., 521; Shelby v. Hicks, 5 Sneed, 197; Weller v. McNabb, 4 Sneed, 422.

FROM WILLIAMSON.

Appeal from Circuit Court of Williamson County.
H. H. Cook, Sp. J.

Green v. Williams.

H. P. FOWLKES and S. S. House for Green.

JOHN H. HENDERSON for Williams.

LURTON, C. J. This is an action at law to set up and enforce a "furnisher's" lien for materials used upon premises now owned by the appellant, Green. A jury was waived, and there was a judgment declaring the lien.

Wall, the then owner of the premises, contracted with one Vaughn to make certain repairs and alterations, and to furnish the materials. Vaughn agreed to take in payment an order on one of Wall's debtors in part settlement, and that Wall should work out the rest of his bill.

Vaughn, on his own credit, contracted with the plaintiff, Williams, for the materials, and that they should be delivered on Wall's premises. Pending the improvements, Wall sold the premises to the plaintiff in error. Part of the materials were delivered before this sale and a part after. Upon the completion of the work, Vaughn having failed to pay the subcontractor, Williams, for the materials so furnished, the latter, within the time required by the statute, gave notice of his claim to a lien on the premises both to Wall and Green, his vendee.

Wall and Vaughn being insolvent, Williams seeks to enforce his lien as a furnisher against the building to which they were furnished.

It appears that when Green bought he went to

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Vaughn, the contractor, to ascertain whether he claimed any lien as a mechanic, with a view of withholding from his vendor a sufficiency of the purchase-price to protect himself. Vaughn informed him as to the arrangement with Wall in regard to payment, and assured him that he claimed no lien. Under this assurance the vendee paid the purchase-money in full and took deed.

It is clear that, under this state of facts, Vaughn could not assert any lien as against such a purchaser. But the lien in favor of the furnisher of materials is distinct from, and independent of, that of the original contractor. The statute gives the lien to several classes of persons, and the lien of each depends upon the statute, and is not derived from the right or dependent upon the existence or non-existence of the lien of any other. The contractor may by contract or conduct waive or estop himself. But his subcontractor may nevertheless bring himself within the protection of the statute, and independently assert a lien for his work or materials.

That Williams sold these materials to the contractor, and upon the personal credit of the contractor, does not prevent the creation of the statutory lien, unless he expressly waived the lien, or has by his conduct estopped himself from its assertion. Nothing of that sort appears in the evidence. Green knew nothing of Vaughn's contract for materials with Williams. Williams was equally ignorant of the sale by Wall to him. He did

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nothing to mislead the purchaser. He did nothing to cut himself off from the assertion of any lien given him under the statute.

But it is insisted very earnestly for plaintiff in error that he purchased the property without any notice of Williams' claim; that no notice was given him, and the claim remained unregistered until after he had bought and paid for the property. It is also shown that he knew nothing of the delivery of materials after he bought, until after delivery, and after the materials had been worked into the house. The notice required by the statute was given within thirty days after the completion of the contract, and, we may add, within thirty days after the delivery of the last of the materials he had contracted to furnish. This claim was then registered as required by the statute, and suit brought within ninety days. Does the lien begin only when the notice has been given, or does it begin when the delivery of the materials begins? Upon the solution of this depends the judgment.

Under the old Act of 1845-6, Ch. 118, carried into Code (T. & S.) as § 1986, the lien given by the Act of 1825, Ch. 37 (being § 1981, Code of T. & S.), was extended to every person "employed by such mechanic, founder, or machinist to work on the building, * * * or to furnish materials, if, at the time he begins to work or furnishes materials, he notifies the owner of the property, in writing, of his intention to rely upon

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the lien." It is clear that, under this original Act, the lien *began when the delivery of materials began*, provided notice was then given. If there was any delay in giving the notice, the lien was lost. *Shelly v. Hicks*, 1 Sneed, 197.

To meet such a result, § 1986 (T. & S.) was so amended by the Act of 1881, Chapter 67, Section 2, as to add to it the following:

"Such person shall also have a lien, if such written notice is served on the owner during the progress of the work, or after its completion, and before the contractor has been paid, but only to the extent of any sum or balance then due or to become due under said contract."

Here it is seen that the effect of the failure to give notice of the intent to rely upon the lien at the commencement of the delivery was to limit the lien to the *balance due* or to become due to the original contractor. This amendment of the Code was itself amended by the Act of 1889, Ch. 103, so as to give the *same lien* originally extended to the contractor to all such *subcontractors* as are mentioned in § 1986, and in the Act of 1881, as should, "within thirty days after the building is completed, or the contract of such laborer, mechanic, or workman shall expire, or he be discharged, * * * notify, in writing, the owner of the property on which the building or improvement is being made * * * that said lien is claimed; * * * * * Provided, A statement of the amount due for such

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work, labor, or material shall be filed with the County Register; * * * * and this registration shall be notice to all persons of the existence of the lien."

By this amendment the limitations of the lien to the *balance* due the contractor, when the notice was not given before the materials were delivered, was removed. By the same Act the owner is protected against demands which should come upon him after payment to the contractor, by being permitted to take a bond, and to have summary relief thereon. This Act was construed, and its constitutionality vindicated, in *Cole Manufacturing Co. v. Falls*, 90 Tenn., 471 *et seq.*

Now, the Act amended by the two Acts we have cited clearly provided that the lien should begin when the work began, or when the delivery of materials began, provided notice was given of the intent to rely upon the lien before the work began or the delivery of materials began. The effect of the amendment is not to postpone the beginning of the lien, but to postpone the time when the notice may be given of the intent to rely on the lien. The lien begins when the delivery begins. It is lost if notice be not given within the time specified in the statute. Any other construction would defeat the purpose of the Act. If the property, pending the improvements, may pass to a vendee freed from the lien, then it would be likewise subject to judgment and attachment liens, and a mortgagee would acquire a su-

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terior right. If this be the meaning of the amendment of 1889, then the persons intended to be benefited by a postponement of the time within which notice must be given of intent to rely upon the lien, have been really injured and misled to their ruin. We are strengthened in this conclusion from a consideration of the character of the lien extended to "persons employed by such mechanic," etc.

The lien given to the original contractor for work or materials, as defined in § 1981, Code of T. & S., was expressly declared to "continue for one year after the work is finished or materials furnished, * * * and bind the lot or land, although the owners may convey or otherwise dispose of the same." This lien did not depend upon notice to the owner, or owe its continuance to any registration; yet, being a statutory lien, subsequent incumbrancers or purchasers were compelled to take notice of it, and took the property during the time of its continuance subject to its existence. *Weller v. McNabb*, 4 Sneed, 422.

This lien, given primarily only to the original contractor, was extended to subcontractors for work or material by the various Acts we have cited. The lien thus extended continues, by the force of the statute, for ninety days after registration, and binds the property of the owner, "although he may convey or otherwise dispose of it;" provided only, that notice is given and registration made in the manner pointed out by the amendments.

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Any one purchasing property under improvement, and before notice and registration, takes it subject to the statutory notice that mechanics and furnishers may perfect the inchoate and statutory lien by the statutory notice and registration. The statute is notice to all who deal with the property, and purchasers cannot complain, because they buy with a knowledge of the law, whereby a lien may rest upon the property they buy.

The registration required by the Act of 1889 was held not to be necessary as between the owner and material-man, and in the same case it was decided that payment by the owner to the contractor before notice did not defeat the furnisher's lien. *Reeves v. Henderson*, 6 Pickle, 521.

Very little aid is to be derived from the examination of cases from other States, unless we examine the statute under construction. In some cases the lien arises only from the notice. In others it does not depend upon notice at all. In still others it is lost unless the notice be given within a specified time. Under one of the earlier New York statutes, that of 1851, the interest affected by the lien was limited to that belonging to the owner at the time notice was filed. *Hauptman v. Catlin*, 20 N. Y., 247.

Under a subsequent Act, the lien was construed to begin as the materials were furnished or when the work was begun, and that it followed the property into the hands of whosoever should afterward acquire it. Under that Act, a purchaser,

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after the lien had begun, was held not a necessary party, as the statute gives a specific lien on the property, and authorized a proceeding *in rem*. It was urged that the statute was unconstitutional on account of this remedy, "as it may enable the claimant to reach the property of a third party without due process of law." The Court answered this objection by saying: "The services were performed while the defendant was the owner, and he could not relieve the property from the lien nor absolve himself from his contingent liability by a subsequent conveyance to a third person. There is no provision of the Constitution which precludes the Legislature from declaring a statutory lien, in respect to future contracts, in favor either of the contractor, the subcontractor, or the laborer, upon the land of the owner, at whose instance and for whose benefit the services are rendered. The Act of 1852 was in force when the contract in question was made; and every contract is presumed to be executed with reference to existing laws, and subject to such modifications, in respect to the remedies of the parties, as may result from subsequent legislation, if free from constitutional objection. The question as to the rights of Bell, the grantee, is not legitimately involved in the present appeal; but, as he purchased property which was subject to an existing statutory lien, it is to be presumed that the price was fixed with reference to the incumbrance, or that he secured himself from loss by appropriate covenants. Be

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that as it may, the statute is free from constitutional objection." 31 N. Y., 287.

The constitutionality of our own Act of 1889 was supported by Judge Caldwell by a like line of reasoning. 90 Tenn., 471.

That the lien begins with the work or on the commencement of delivery of materials, and is perfected or continued by the notice, has been frequently decided. So it has been often decided that a purchaser or incumbrancer, after the beginning of the lien and before the time required for notice, takes subject to the statutory lien, provided it is followed by the statutory notice. Am. and Eng. Ency. of Law, Vol. XV., 111, 112, and cases cited.

Judgment affirmed.

Smith v. Goodlett.

SMITH v. GOODLETT.

(Nashville. February 8, 1893.)

I. LIMITATIONS, STATUTE OF. *Of seven years does not protect mortgageor's heir against foreclosure suit.*

Suit for foreclosure of mortgage or deed of trust on realty brought by the mortgagee or trustee against the heirs of the mortgageor more than seven years after his death, is not barred by the statute of limitations of seven years for the protection of the estates of decedents.

Code construed: §§ 3119, 3483 (M. & V.); §§ 2281, 2786 (T. & S.).

Cases cited: Henderson v. Tipton, 88 Tenn., 255; Love v. Welch, 88 Tenn., 259; Fitzsimmons v. Johnson, 90 Tenn., 441; Sigler v. Vaughn, 16 Lea, 346; Caldwell v. McFarland, 11 Lea, 463; Bomar v. Hagler, 7 Lea, 89; Williams v. Conrad, 11 Hum., 412; Stone v. Sanders, 1 Head, 248; State v. Crutcher, 2 Swan, 512; Foster v. Maxey, 6 Yer., 225; Pea v. Waggoner, 5 Hay., 1; Peck v. Wheaton, Mart. & Yer., 353; Wooldridge v. Page, 1 Lea, 135; Henry v. Mills, 1 Lea, 144; Smith v. Hickman's Heirs, Cooke, 330; Lewis v. Hickman, 2 Overton, 316.

2. INTEREST. *Allowed from date of note, when.*

Interest runs from date, not from maturity, of note in the following language, to wit:

"NASHVILLE, Sept. 9, 1879.

"Twelve months after date we promise to pay to the order of A. W. Butler three thousand dollars, with interest at the rate of six per cent. per annum."

DAVIDSON COUNTY.

Appeal from Chancery Court of Davidson County.

ANDREW ALLISON, Ch.

Smith *v.* Goodlett.

BAXTER SMITH for Smith.

M. C. GOODLETT for Goodlett.

CALDWELL, J. The bill in this cause was filed to foreclose a deed of trust.

On the ninth day of September, 1879, Wm. A. Prewitt and his wife, Mary E. Prewitt, executed their joint promissory note to A. W. Butler for \$3,000, due in twelve months; and, on the same day, they conveyed to Baxter Smith, as trustee, with power of sale, a certain tract of land belonging to the said Mrs. Prewitt, to secure the payment of that note.

Mrs. Prewitt died "sometime in 1880," and Wm. A. Prewitt "in 1889."

On the twenty-eighth of February, 1890, the trustee filed this bill against the heirs of Wm. A. and Mary E. Prewitt and the administrator of Wm. A. Prewitt, to foreclose the deed of trust by a sale of the land, to pay a large balance alleged to be due on the note mentioned.

The defendants answered the bill, and, by way of defense, relied mainly upon the statutes of limitations of six years and seven years.

The cause was referred to the Master for an account. He reported \$2,652.16 as still due on the note. Exceptions were overruled, and the report confirmed.

No personal decree was sought or granted against any one; but, on confirmation of the re-

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port, it was adjudged and decreed that, unless the said sum of \$2,652.16, with interest and costs, should be paid into Court within thirty days, the Master should advertise and sell the land described in the deed of trust, and apply the proceeds in payment of that sum.

From that decree the heirs appealed to this Court.

The principal contention of appellants is that the land in question descended to them upon the death of Mrs. Prewitt, in 1880, and that it is now protected in their hands under the Acts of 1715 and 1789 (M. & V. Code, §§ 3119 and 3483), more than seven years having elapsed after her death and after the maturity of the secured debt when this bill was filed.

Nothing is better settled than that those Acts established a positive prescription, not only barring the remedy, but actually extinguishing the right of action against the estate of a dead person, whether in the hands of the personal representative or in the possession of the heir. *Fitzsimmons v. Johnson*, 90 Tenn., 441; *Sigler v. Vaughn*, 16 Lea, 346; *Caldwell v. McFarland*, 11 Lea, 463; *Bomar v. Hagler*, 7 Lea, 89; *Williams v. Conrad*, 11 Hum., 412; *Stone v. Sanders*, 1 Head, 248; *State v. Crutcher*, 2 Swan, 512; *Foster v. Maxey*, 6 Yer., 225; *Rea v. Waggoner*, 5 Hay., 1; *Peck v. Wheaton, Mart. & Yer.*, 353. See also *Woolridge v. Page*, 1 Lea, 135, and *Henry v. Mills, Ib.*, 144.

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That prescription has rightly been given a very broad scope. It has been held to apply not only to "creditors" and "demands," in the ordinary signification of those terms, but also to vendee of lands claiming under title-bond of the decedent, and asking a specific performance of his contract (*Smith v. Hickman's Heirs*, Cooke, 329; *Lewis v. Hickman*, 2 Overton, 316), and also to persons seeking to set up a resulting trust in land to which the decedent held the legal title at the time of his death. *Love v. Welch*, 88 Tenn., 259; *Henderson v. Tipton*, *Ib.*, 255.

But, notwithstanding the very comprehensive terms of those statutes, and the very liberal construction that has been given them in favor of the heir, we do not believe they were intended to embrace, or should be allowed to control, a case like that before us. The Court has never gone so far in construing them as appellants would now have us go; and we see no sound reason for extending the decisions heretofore made.

The lapse of seven years was never intended, under those statutes, to change title from one person to another. It does not divest title at all, or enlarge the estate of a deceased person, but only preserves his title or estate, whatever that may be, for his heirs. It saves for them absolutely what he *had*, but does not give them what he *had not*.

In the case at bar, Mrs. Prewitt had only an equity in the land when she died; that, and that alone, descended to her heirs, and is preserved to

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them by lapse of time. The legal title was not in her, and, consequently, could not descend from her to them. It was in her trustee, who still holds it for the purposes of the trust. Lapse of time has not divested him of that title, nor impaired the interest of the beneficiary for whom he holds it.

Mrs. Prewitt could have regained her title only by payment of the secured debt, or by release on the part of the beneficiary. Her heirs could regain it in no other way. Neither payment nor release has been accomplished as a matter of fact or by lapse of time. The prescription, positive though it be, does not go so far as to destroy vested rights or extinguish an express lien.

A decree of foreclosure allows to the heirs of Mrs. Prewitt all the title she had in the land at the time of her death, and completely protects them in its enjoyment. It takes nothing from them. She then owned a bare equity in the land —a right to reclaim it by payment of the secured debt. The decree accords the same equity or right to her heirs. They are protected in all that she had, and have the same legal means of making it available, and regaining that with which she parted by her deed.

Nothing which can properly be said to have formed a part of her estate when she died, is taken from her heirs by a foreclosure of the deed of trust. Only that part of her estate which she had, by that instrument, previously divested herself

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of, is denied to her heirs by a decree of foreclosure.

The interest she had in the land at death—nothing more, nothing less—passed to her heirs by descent; and that same interest, neither greater nor less, is confirmed to them absolutely by the positive prescription of the statutes under consideration.

Again, Mrs. Prewitt owned the land subject to the deed of trust. When she died her heirs took it subject to the same incumbrance, and that incumbrance was an express trust, against which no statute of limitations will run.

With reference to the account, appellants contend that it was error to allow interest on the note from date, when it did not mature until twelve months after date. The note is in this language:

“NASHVILLE, TENN., Sept. 9, 1879.

“Twelve months after date we promise to pay to the order of A. W. Butler three thousand dollars, with interest at the rate of six per cent. per annum.”

Interest was properly allowed from date. The words “with interest” imply a promise to pay interest from date. They perform no other office in the contract, and could have been used by the parties for no other purpose. Without them the note would have carried interest from maturity as a matter of law. 2 Parsons on Notes and Bills, 392, 393.

Affirm, with costs.

Colyar *v.* Sax.

COLYAR *v.* SAX.

(Nashville. February 8, 1893.)

1. ABANDONED "BOOM" TRANSACTION. *Rights of parties.*

Several persons united in a scheme to purchase and develop a body of mineral lands. It was developed, after several thousand acres had been purchased, that the original promoters had not the necessary funds to "float" the scheme, and other parties were, from time to time, admitted "upon the ground floor," and advanced the required funds. Some of these took specific and defined interests in the transaction; others did not. Titles were taken in the name of one or more of the original promoters, but after some 12,000 acres had been secured, the entire body of lands was conveyed to a trustee for the benefit of all parties interested. Subsequently other lands—11,000 acres—were purchased by part of those interested in the original purchase of 12,000 acres, others declining to enter into the last purchase. The 11,000 acres was likewise conveyed to the same trustee. At this point the scheme was abandoned by common consent, and suits brought to have the rights of the parties declared, and the lands sold and their proceeds distributed.

Held: None of the lands reverted to the original promoters by way of resulting trust; but the transaction should be settled upon principles applicable to a partnership, by dividing the net proceeds of the two purchases among those interested in each, giving each person the specific interest he contracted for, or, in the absence of such contract, then an interest in proportion to the advancement in money and services made by each.

2. SAME. *Same.*

And if any of the joint purchasers who contracted to take a specific interest in the land, has failed to pay his proportion of the purchase-price, the deficit should be made good out of his share of the proceeds of sale.

Cases cited and approved: Gee *v.* Gee, 2 Sneed, 395; Rankin *v.* Black, 1 Head, 658; Williams *v.* Love, 2 Head, 84; Furman *v.* McMillian,

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2 Lea, 121; Pearl *v.* Pearl, 1 Tenn. Ch., 207; 19 Am. Rep., 735; 50 Am. Rep., 727.

FROM GRUNDY.

Appeal from Chancery Court of Grundy County.

T. M. McCONNELL, Ch.

J. H. HOLMAN & CARTER for E. F. Colyar.

VERTREES & VERTREES for Duncan.

PERCY D. MADDIN for N. B. Spears.

N. COHN for Sax.

BROWN & SPEARS, STEGER, WASHINGTON & JACKSON for W. D. Spears.

JOHN A. PITTS and W. C. SHELTON for A. S. Colyar.

J. C. BRADFORD for Richardson, Mason & Co.

J. B. FERGUSON, guardian ad litem.

WILKES, J. The first-named bill was filed to cancel certain deeds made by E. F. Colyar to Max Sax, trustee, etc., and set up in favor of E. F. Colyar a resulting trust in the lands conveyed. The second bill was filed to sell the same lands

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for partition, to fix the rights of parties therein, and divide the proceeds.

The Chancellor, Hon. T. M. McConnell, fixed the rights of the parties by decree, and ordered a sale of the lands. There was no dissatisfaction with or appeal from the decree for sale, but none of the several parties interested were satisfied with the decree fixing their rights *inter sese*, and all have appealed, and assigned errors, which raise simply the question as to the proper distribution of the proceeds of the lands when they shall be sold.

The facts, so far as necessary to be stated, are found to be as follows: About 1882 E. F. Colyar, who resided at Tracy City, Grundy County, conceived the idea of buying up a large number of tracts of mineral lands, with a view of consolidating them into one body, and enlisting capitalists in their development. Soon after he began operations, he associated with him E. O. Nathurst and W. D. and N. B. Spears, the first named being very familiar with the mineral wealth of the region, and the two latter being attorneys, familiar with the titles of the lands in that section. A. S. Colyar soon became interested, and furnished some money to be used in the purchase of the lands, \$1,500 of which he obtained from Richardson, Fall, and Loughmiller, upon an agreement with said A. S. Colyar that, to the extent of the money furnished, they were to have an interest in the lands.

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Still the parties could not command the necessary funds to carry out their designs; and on June 21, 1884, Benton and John McMillin accepted a written proposal from E. F. Colyar and E. O. Nathurst to go into the enterprise, upon terms that they were to furnish not exceeding \$20,000 to pay for the lands, and have a first mortgage on the lands until repaid. The profits were then to be equally divided. This written proposition was afterward lost sight of, and the mortgage was never executed, nor does it appear that the other parties interested knew of the writing; but they co-operated upon a basis substantially as the writing indicated.

Failing to obtain the necessary means to pay for the lands, a considerable quantity of which had been contracted for and options taken, other parties were let in, among them Wm. Morrow, who contributed some money toward the enterprise. John and Benton McMillin, A. S. Colyar, E. F. Colyar, and E. O. Nathurst each had made contributions, but a large deficit remained. A. S. Colyar, Benton and John McMillin, and Wm. Morrow were attempting to enlist capital in the enterprise, while E. F. Colyar, Nathurst, and Spears were buying up and securing the lands. Matters dragged along until the latter part of 1885; and in the meantime several tracts of land were lost for want of funds to pay for them.

A. S. Colyar, at this juncture, interested Max Sax, and, through Mr. Sax, certain New York

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parties were induced to furnish the money to complete the purchase of the lands, all parties consenting thereto or acquiescing therein. The money was paid over by the New York parties to Sax, as trustee, and it was agreed they should, in consideration therefor, have a half-interest in the lands. The lands were to be, and were, conveyed to Sax, trustee, in trust. About three months after this money was paid over to Sax and applied to the payment of the lands already bargained for, containing about 12,000 acres, the New York parties proposed that more land be purchased; and it was agreed between them and A. S. Colyar to increase the holdings to 25,000 acres, to be paid for one-half by the New York parties and one-half by A. S. Colyar and such parties as he might enlist with him, called the Tennessee parties. All agreed to this, but E. F. Colyar and E. O. Nathurst and the McMillins declined to furnish any funds for the second purchase.

The titles to these lands were also to be taken to Sax, as trustee, and he was to convey the same to a corporation so soon as formed, which was to have a capital stock of \$1,000,000, and to issue \$1,000,000 of bonds, of which \$200,000 of stock and the same amount of bonds should be given for these lands. Sax was to have ten per cent. for promoting the scheme, and the remainder should be divided between the parties as their interests might appear. About 11,000 acres of land were bought and conveyed to Sax, part of them

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in trust and part to him as an individual, but it is conceded they are all held subject to the trusts. The charter for the corporation was obtained, the stock was subscribed, and a site was selected for the erection of a furnace.

But several of the New York parties died, the price of iron declined, and the entire enterprise collapsed, and was abandoned. Subsequently McMillin, Morrow, and Duncan bought out nearly all of the New York parties. Morrow bought out Duncan's interest, and then assigned his interest to J. L. Gaines, trustee.

N. B. Spears withdrew from the enterprise before the New York parties came in, and by suit in the United States Circuit Court, at Chattanooga, had his interest fixed by decree at one-eighth interest in the Spring tract of 5,000 acres, all of which was conveyed to Sax, trustee; and N. B. Spears' interest is conceded to be settled in that way.

These bills were then filed to declare the rights of the parties, and to sell the lands for division.

The Chancellor held—

First.—That the deed dated February 27, 1886, made by E. F. Colyar to Max Sax, trustee, conveying the "first" body of 12,000 acres of land, be canceled.

Second.—That the title to all said 12,000 acres of land be divested out of Sax, and invested in E. F. Colyar, E. O. Nathurst, and W. D. Spears equally—excepting the one-eighth of the "Spring" tract, which was decreed to N. B. Spears.

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Third.—That A. S. Colyar, Benton McMillin, John McMillin, and Dr. Morrow have a lien on said land to secure the payment of the money they had contributed to pay for the lands.

Fourth.—That the “New York parties” have a similar lien for the money they contributed towards paying for the land.

Fifth.—That this lien mentioned in paragraph four inured to Benton McMillin and Dr. Morrow (or Gaines, trustee), to the extent of the interests of the New York parties which they had purchased.

Sixth.—That all the other lands—the 11,000 acres, called the “second” deed lands—were held by Sax in trust for the benefit of the “New York parties” and their assigns, and such other persons as furnished money to pay for them.

Seventh.—That the beneficiaries mentioned in paragraph six were entitled to the lands *in proportion to the money furnished by them and used in paying for the said “second” lands.*

Eighth.—That E. F. Colyar, E. O. Nathurst, W. D. Spears, and N. B. Spears furnished no money to pay for the second lands, and had no interest therein.

Ninth.—That they should have a lien thereon to secure the payment of reasonable compensation for their services in buying up the lands, and such expenses as they incurred in so doing.

Tenth.—That Fall, Richardson, and others should be subrogated to all the rights of A. S. Colyar against the “first” lands to the extent of \$1,500.

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Eleventh.—That they (Fall, Richardson, *et al.*) were entitled to be subrogated to the rights of A. S. Colyar in the “second” lands, and take an interest therein out of his share (if any he should appear to have on the taking of the account or deed) to the extent that \$500 would entitle them as against said Colyar.

Twelfth.—That J. L. Gaines, trustee, take the interest of Wm. Morrow for the benefit of creditors.

Thirteenth.—That all the lands be sold in one body upon certain terms. It is not necessary to state the terms, as this part of the decree was rendered by consent, and from it there is no appeal.

Fourteenth.—It was further decreed that an account be taken (1) to ascertain the liens declared on the “first” lands; (2) the names of the parties who furnished the money to pay for the “second” lands, and the amounts respectively contributed; (3) the liens declared on the second lands; and (4) the taxes due and unpaid.

Fifteenth.—That the proceeds of sale be distributed as the rights and interests of the parties had been decreed.

The quantity of land secured was about 23,000 acres, 12,000 in the first purchase and 11,000 in the last purchase. The original cost, not estimating labor and services rendered in their purchase, was about \$29,000, and the estimated value now is about \$186,000. So that, of the amount the Court is called upon to distribute, about \$157,-

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000 is profit. There is also a balance in the hands of the trustee of \$3,000 or more.

There is much controversy as to the amounts of cash contributed, services rendered, and labor performed by the parties *inter sese*; and it is insisted that the amount contributed by A. S. Colyar was merely a loan to his brother, E. F. Colyar, a view which this Court cannot, under the facts in this case, adopt. Very able arguments have been made, and very elaborate briefs have been filed, on behalf of all the parties. It has been pressed upon the Court with zeal and much ability that the doctrine of a resulting trust applies to the first body of lands in favor of E. F. Colyar, E. O. Nathurst, and W. D. Spears, and that the title to the lands should be revested in them, charged with the repayment of the purchase-money; and also that the same principle applies to the second body of lands in favor of the New York parties, charged with a like incumbrance. We do not think either is a case of resulting trust, but that the transaction of the parties was a venture in each case in an enterprise for their joint benefit; and the scheme of stocking and bonding the lands having failed and been abandoned, the property in each instance should be divided substantially upon the principles of law applicable to partnership transactions.

The fact, if such it be, and we do not now determine the same, that A. S. Colyar and his Tennessee associates in the second purchase did not

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furnish their one-half of the funds required and used in their purchase does not alter the rule, but such inequalities of payment, if they exist, will be equalized out of the proceeds of sale before the same is distributed. *Gee v. Gee*, 2 Sneed, 395, 403; *Rankin v. Black*, 1 Head, 658; *Williams v. Love*, 2 Head, 84; *Furman v. McMillian*, 2 Lea, 121; *Pearl v. Pearl*, 1 Tenn. Ch., 207; *Richards v. Ginnell*, 50 Am. Rep., 727; *Holmes v. McCray*, 19 Am. Rep., 735.

The Court is of opinion that the proceeds of these lands should be distributed, and a decree will be drawn in accordance with the following instructions:

As to the first body of lands—

First.—The purchase-money paid for the land will be refunded, without interest, to the parties who contributed it or their assigns.

Second.—All taxes upon the lands shall be paid.

Third.—Sax, the trustee, upon making a full and satisfactory statement of his trust, may be allowed reasonable compensation for his services if, upon such settlement, he shows himself entitled thereto.

Fourth.—One-half the remainder of said proceeds will be paid to the New York parties, or their assigns, to be distributed among them according to the amounts contributed by them respectively.

Fifth.—The other half of said remainder will belong to the parties who were interested in said enterprise before the New York parties came into it;

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and their half will be distributed among them according to their respective contributions to purchase the lands, whether such contributions were in money or services rendered, as hereinafter indicated. These parties are E. F. Colyar, E. O. Nathurst, W. D. Spears, Benton McMillin, A. S. Colyar, and J. L. Gaines, assignee.

Sixth.—To determine these several interests a reference is ordered.

Seventh.—In executing this order, the amounts paid by A. S. Colyar will be treated as an investment, and not as a loan.

Eighth.—A. S. Colyar will have credit for such amounts as were paid by him out of his own means, and such other amounts as were furnished by other parties through him to be invested in the lands.

Ninth.—A. S. Colyar will account to Richardson, Fall, and Loughmiller for the amounts furnished by them to him out of the share thus set apart to him and for his immediate associates in the eighth item; and these parties will be entitled to share in the interest of said A. S. Colyar in the proportion which their contributions bear to the entire amounts furnished by A. S. Colyar.

Tenth.—E. F. Colyar, E. O. Nathurst, and W. D. Spears will be entitled to a fair and reasonable allowance for their labor and services in getting up and buying the lands; and the amounts thus allowed them, when ascertained, will be treated and placed on the same basis as the money con-

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tributions, and will increase their interest in the land, beyond the money contributed, to the amount thus allowed them for their services.

Eleventh.—The value of the one-eighth interest of N. B. Spears in the Spring tract of 5,000 acres will be charged up against, and be paid out of, the share and interests of E. F. Colyar, E. O. Nathurst, and W. D. Spears.

The proceeds of the second body of the land will be distributed as follows:

First.—All taxes on the lands will be paid.

Second.—Such compensation shall be paid to E. F. Colyar, E. O. Nathurst, W. D. Spears, and Max Sax, trustee, as they may show themselves entitled to receive for services rendered by them about the second body of lands, and all actual expenses incurred by them about the same, will be refunded with interest. These amounts will be paid to them as a money compensation, and shall not give them any interest in the lands, but only a right to payment out of the proceeds.

Third.—All amounts contributed toward the purchase of these lands will be refunded, without interest, to the parties who furnished the same.

Fourth.—One-half the remainder, including the balance in the hands of Sax, trustee, on a full and fair settlement, will belong to the New York parties or their assigns in the proportion *inter sese* of their contributions.

Fifth.—The other half will belong to A. S. Colyar and such persons as he may have associated

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with him in this second purchase outside of the New York parties, including Richardson, Fall, and Loughmiller, to be distributed between them according to their money contribution toward the second purchase.

Sixth.—A reference will be ordered to ascertain the facts necessary to make this distribution.

The decree of the Chancellor is reversed and modified so as to conform to the directions herein given, and the cause will be remanded for further proceedings, and to execute the references ordered, and for a sale of the land. The costs of the cause to date, including costs of the appeal and of this court, will be paid out of the gross proceeds of the lands when sold.

Taylor *v.* Badoux.

TAYLOR *v.* BADOUX.

(Nashville. February 9, 1893.)

1. CHANCERY COURT. *Jurisdiction to aid non-resident creditor.*

Although debtor and creditor are non-residents of this State, and both residents of the same State, our Chancery Courts have jurisdiction, conferred by statute, independently of the attachment laws, to aid such creditor to subject his debtor's "real or personal property" situate in this State to the payment of his debt, where the creditor has exhausted his legal remedy in the State of their common residence.

Code construed: § 5040 (M. & V.); § 4297 (T. & S.).

Cases cited: Davis *v.* Fulton, 1 Tenn., 121; Gilman *v.* Tisdale, 1 Yer., 285.

2. SAME. *Same. Repeal.*

And the statute conferring this jurisdiction upon the Chancery Courts is not repealed or affected by the subsequent modification of the attachment laws, forbidding the issuance of original attachment where both creditor and debtor are non-residents of this State and residents of the same State, except upon affidavit that the debtor has fraudulently removed his property to this State to evade the process of law in the State of their common residence.

Code construed: § 4193 (M. & V.); § 3455a (T. & S.).

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
ANDREW ALLISON, Ch.

PITTS & MEEKS and E. S. SCRUGGS for Taylor.

Taylor v. Badoux.

J. B. DANIEL for Badoux.

SNODGRASS, J. Complainant and the principal defendant are both residents of Illinois. The suit is brought to subject property owned by defendant in Tennessee, under § 5040 of the Code (M. & V.), on allegations of judgment recovered, execution issued, and return of *nulla bona* in the State of their residence.

Attachment and injunction issued, and were duly executed.

The defendants other than the debtor defend by demurrer, and insist that property in their hands, and in which they are interested with defendant, cannot be reached or appropriated in this proceeding, because it is not alleged in the bill that the property sought to be subjected "had been fraudulently removed to this State to evade the process of law in the State of the domicile or residence" of the parties, as required by Act of 1871, Ch. 122. Code (M. & V.), § 4193.

It is insisted that this Act repealed or modified that before quoted. The Chancellor overruled the demurrer, and allowed defendants to appeal; and they insist upon same grounds here that the decree is erroneous.

This contention is not well made. The first Act gave the Chancery Court exclusive jurisdiction to relieve a creditor, under the precise conditions within which complainant brings himself, and under no other. It is among the subjects long since

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placed within the exclusive jurisdiction of the Chancery Court. See Title 9, and subdivisions, of Chapter 1, Article I., of the Code; *Davis, Ex'r, v. Fulton*, 1 Tenn., 121; *Gilman v. Tisdale*, 1 Yer., 285.

The Act of 1871 regulated only the general practice as to attachments at law or in equity, and permitted them in all cases where property had been fraudulently removed to this State from that of the residence of the parties, to evade the process of law in the State of their domicile or residence. Under this Act, the suit need not be brought in equity, nor upon allegations of remedy exhausted in the State where parties reside. It is generally allowed on all claims and in all Courts.

The Act was merely to amend the general attachment laws. But the special and exclusive jurisdiction conferred upon Courts of Equity, to subject the property of a non-resident under the other Act, was not affected, and this may be properly done by attachment even if attachment is not absolutely necessary.

Affirm, and remand for further proceedings.

Bank *v.* Stockell.

BANK *v.* STOCKELL.

(Nashville. February 22, 1893.)

1. NEGOTIABLE INSTRUMENTS. *Given in purchase of patent-right.*

The unexplained initials, "C. I. P.," written upon the face of a negotiable note do not convey notice to an innocent indorsee of the note before its maturity, for value, and in due course of trade, that it was given in purchase of a patent, known as the "Chapin Iron Process," so as to let in defenses against such indorsee under the statute providing that a note given in purchase of a patent-right, "shall be subject, in the hands of any holder or assignee, to all the legal and equitable defenses to which it was subject in the hands of the original payee, when the fact that it was so given in such purchase appears on its face."

Code construed: § 2481 (M. & V.).

Case cited and approved: Bank *v.* Hagerty, 88 Tenn., 705.

2. SAME. *Indorsement of note as collateral security.*

A bank is protected as an innocent indorsee or holder, where it took a negotiable note upon the payee's indorsement, before its maturity and without notice of defenses, to hold it as collateral security for another note of like amount indorsed by the payee and cashed for his benefit upon the credit of such collateral security.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
ANDREW ALLISON, Ch.

JOHN RUHM & SON for Bank.

Bank *v.* Stockell.

JAMES S. PILCHER for Stockell.

WILKES, J. The bill in this cause was filed to recover the amount of two notes made by C. H. Stockell to John F. Haskins, and by him indorsed to plaintiff. The notes are as follows:

“(1) \$1,000. CHATTANOOGA, TENN., April 8, 1890.

“Four months after date I promise to pay to the order of John F. Haskins one thousand dollars, at the First National Bank, Chattanooga, Tenn. Value received, C. I. P.

“C. H. STOCKELL.”

“(2) \$750. CHATTANOOGA, TENN., May 29, 1890.

“Four months after date I promise to pay to the order of John F. Haskins seven hundred and fifty dollars, at the First National Bank, of Chattanooga, Tenn. C. I. P.

“C. H. STOCKELL.”

These notes were renewals of two others previously given for a part interest in a patent called the “Chapin Iron Process,” which Haskins had contracted to introduce and extend over several States, including Tennessee.

It is insisted by Stockell, the maker of the notes that Haskins, the payee, failed to prosecute the work of introduction, and thereby forfeited all right to the patent, and hence these notes, executed for a part interest, were without consideration.

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The bank insists, however, that it is an innocent holder of the notes, for full value, given at the time of indorsement, which was prior to their maturity.

As against the bank, Stockell insists that it had actual notice of the consideration on which the notes were based when it took the notes, and, further, that they had upon their face notice that they were given for a patent-right.

Upon an examination of the record, we think it fails to show that the bank had actual notice as claimed.

But it is insisted that the letters, "C. I. P." on the face of the notes is sufficient notice of the fact that they were given for a patent, to wit, the "Chapin Iron Process," so as to bring them within the rule laid down in § 2481 of the Code (M. & V.), which is as follows:

"A note or other security, given in this State in the purchase of a patent-right, or any interest therein, shall be subject, in the hands of any holder or assignee, to all the legal and equitable defenses to which it was subject in the hands of the original payee, when the fact that it was so given in such purchase appears on its face."

We think the initials, C. I. P., standing unexplained on the face of the notes, give no notice whatever of their meaning, nor could any one, from them, in any way, ascertain that the consideration of the notes was the sale of a patent, or any interest therein; and unless such fact appears

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on the face of the notes in an intelligible form, they do not fall within the provisions of the statute. *Bank v. Hagerty*, 4 Pickle, 705.

It is next insisted that the notes were transferred to the bank as collateral, or in payment of a pre-existing debt. The origin of the transaction between Haskins and the bank is this: Haskins was the President of the South Tredegar Iron Company, and had advanced money to it and loaned it his credit. Desiring to obtain some funds for his own use, he executed to the bank notes of the company, with the indorsement of himself and another, for the same amount as the Stockell notes. At the same time he indorsed the Stockell notes, which were not then due, and placed them as collateral for the note of the company so indorsed by himself and another. The bank thereupon discounted the note of the company, with the notes of Stockell attached as collateral, and entered up the proceeds to the individual account of Haskins.

While there is some uncertainty about the exact date when this discount was made, there is evidence sufficient to show that it was prior to the maturity of the Stockell notes, and that the company's note was discounted on the faith of the Stockell collateral. The bank preferred to discount the note of the company, with the Stockell collateral attached, to discounting the Stockell notes, because the Stockell notes had longer to run to maturity than the usual discounts of the

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bank, and beyond the maturity of the company's notes. These original notes were renewed when they fell due, and so were the Stockell notes renewed when they matured, but they remained in the hands of the bank, as collateral, indorsed in the same manner as the original notes had been.

Stockell, in a cross-bill filed by him, alleges that a part of the money furnished Haskins upon the notes was used by him in the erection of a house on Lookout Mountain, which was afterward transferred to the bank, and this is admitted by Haskins.

We are of opinion that the bank, having received the Stockell notes before their maturity, by regular indorsement from Haskins, the payee, and having at the time parted with its funds upon the faith of the collateral notes attached to the notes of the company, it is a *bona fide* holder for full value in due course of trade, and entitled to all the rights of an innocent purchaser, the original notes of the company, for which the collaterals were given, being still unpaid, and for the same amount as the collaterals. Daniel on Negotiable Instruments, Secs. 824, 825; 2 Am. and Eng. Ency. of Law, p. 391.

There are other assignments of error, based upon equities existing between Stockell, the maker, and Haskins, the payee, but, as an innocent holder by transfer before maturity and for full value, the bank cannot be affected by them.

We therefore affirm the decree of the Chancellor, with costs.

Allen v. Dunham.

ALLEN v. DUNHAM.

(Nashville. February 22, 1893.)

1. GAMING CONTRACTS. *Example of.*

The transaction set out in the Court's opinion, purporting to be a sale of stock by Dunham & Co. to Allen is declared void, as a gaming contract, that may be repudiated by Allen, and the money paid upon it recovered by himself or his wife, or their assignee. (*Post, pp. 258-264.*)

Acts construed: Acts 1883, Ch. 251.

Cases cited and approved: McGrew v. City Produce Exchange, 85 Tenn., 578; 40 U. S. Rep., 499, 508; 33 Am. Rep., 393; 39 Mich., 337.

2. STOCK BROKERS. *Responsible as principals to customers.*

Stock brokers are responsible as principals to customers dealing with or through them. (*Post, p. 264.*)

3. CHAMPERTY AND MAINTENANCE. *Not a defense, when.*

The champerty and maintenance laws afford no defense to defeat a suit by the assignee of the loser's claim to recover of the winner moneys lost in a gambling transaction. (*Post, p. 268.*)

4. COMPOUNDING FELONY. *What is not illegal.*

It is not unlawful for a party having lost money by embezzlement to agree not to prosecute the embezzler upon his refunding the amount embezzled, or otherwise giving full indemnity or satisfaction. Embezzlement, whether of public or private funds, may be lawfully condoned upon repayment of funds embezzled. However, the Court holds that the facts in this case fail to show any agreement not to prosecute. (*Post, pp. 268, 269.*)

Code construed: § 5474 (M. & V.); § 4707 (T. & S.).

Cases cited and approved: Davis v. State, oral opinion at Jackson in 1890; Cheek v. State, oral opinion at Jackson in 1889.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.

ANDREW ALLISON, Ch.

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Allen v. Dunham.

CHAMPION, HEAD & BROWN, H. H. BARR, and M. B. HOWELL for Capital City Bank.

DICKINSON & FRAZER for Fourth National Bank.

J. C. McREYNOLDS, STEGER, WASHINGTON & JACKSON, and A. S. COLYAR for Dunham & Co.

WILKES, J. In May, 1890, F. M. Allen, who was then teller of the Capital City Bank, of Nashville, through his friend Dismukes, made deals with the defendants, whereby he contracted for certain stocks of the market value of \$90,000. The firm had head-quarters in Chicago, with a branch office at Nashville. H. D. Spears, a member of the firm, resided in New York, and was, as he states, a member of the New York Exchange. The defendants claim that they were engaged, both in Nashville and New York, in a legitimate brokerage business, Spears being in charge at New York and Frederick W. Hunter in charge at Nashville.

The manner of dealing was as follows: The customer desiring to deal at Nashville was required to deposit with the Nashville house \$300 upon every purchase of one hundred shares of stock, the par value of the same being \$10,000. When this was done the Nashville manager wired the New York manager to purchase the stock agreed on at a stipulated price. Spears, the New York member of the firm, says, upon receiving

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the telegram, he, made the purchase on the New York Exchange, and wired that fact to the Nashville house, and it was communicated by that house to the purchaser. The entire purchase-price of the stock, it is claimed, was paid in New York by the member there to the person from whom the stock was purchased, and received the certificates of stock so purchased and held them in New York, but did not send them to Nashville or deliver them to the customer. Nothing appeared upon the books of the firm at New York to indicate who the purchaser was; nor did the manager there know for whom the transaction was made; but the purchase was charged up against the Nashville house. In the Nashville house the customer was charged with the full amount of the purchase-price paid in New York, and credited with the \$300 deposited, less \$25 commission. Each transaction with each customer was kept separate, and each deal of the customer was in the end closed out on its own basis, no matter how many purchases might be made for the same person. If there should be a decline in prices sufficient to exhaust the deposit, the customer was called upon to make an additional deposit, or, in other words, to keep up his margin; and, in default, the deal was closed out. Interest was charged by the New York house on the purchase-price, less the deposit, at six or eight per cent., dependent on the condition of the money market and other circumstances, and the stock was held

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by the New York house to secure the amount advanced.

It is for the defendants earnestly insisted that each transaction was an actual one on the New York Exchange; that upon each purchase there was an actual receipt of a stock certificate, and on each sale an actual delivery of such certificate, by the New York house; and that the transactions were not in any way different from those daily made upon the New York Exchange, which have been uniformly held to be legitimate.

Spears testifies that he made the actual purchases and sales, and that the certificates were delivered to him; and he exhibits the telegrams on which the orders were executed, and gives the names of the several parties with whom the several transactions were made.

On the other hand, Dismukes, the party who did the purchasing, states that while it was represented to him that the stock was actually bought in New York, and held by the New York house, still he never expected or intended to take up or receive the stock, nor did Allen, his principal, so intend; that neither he nor Allen were financially able to make an actual purchase of so much stock, but he understood that margins were to be put up on the stock without any intention of ever paying for or receiving it, but that a final settlement was to be made when each separate deal was closed.

Allen states that he advanced margins for the

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purpose of opening transactions with Dunham & Co., whereby, if the stocks advanced upon the market, he was to receive from them the difference between the cost and sale price when the deal was closed, less a commission and interest. If stocks declined, he was either to remargin or lose the margin already put up.

No idea was ever entertained by him of taking or paying for the stocks. He was not able financially to pay for them, which fact was known to the defendants.

After the purchases were made in May, stocks declined, and Dismukes, for Allen, remarginied his stocks more than once, until about August, 1890, when the failure of the Baring Bros. precipitated a financial crisis, and prices tumbled rapidly.

About the eighteenth of August, Dismukes and Allen went together to see defendants, and for the first time it was made known to defendants that the purchases made by Dismukes were really for account of Allen. Upon their suggestion, the account was transferred to Allen, and Dismukes was released from all further connection with the transactions. No papers were drawn, no transfer executed, no notice was given the New York house; but the entire transaction, involving \$90,000 in value, was changed by a mere entry upon the Nashville book from one debtor to another without any care or concern as to who was to be the debtor, and in the face of a rapid decline and panicked condition of the market. Mr. Hunter

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states that upon this occasion Allen told him that he (Allen) had been dealing in a bucket-shop, but that he had decided to close out such deals and buy his stocks outright on the New York market, through defendants, so as to *bull the New York market*; but he seems not to have carried out this bold design, for he bought no additional stock, but simply succeeded to the purchases Dismukes had already made, and the next day threw over his entire holdings, in order to stay, as far as possible, any further calamity to himself.

It matters but little upon which side of this picture we look, whether from the stand-point of Dunham & Co. or of Allen. If we concede that the stock was actually purchased in New York, and certificates received there, as claimed, the question, very naturally, is suggested whether any sane man, looking at the situation of the parties, and the circumstances surrounding them, could believe, for one moment, that Allen ever intended to receive the \$90,000 of stock, or that the defendants ever contemplated its delivery. There was no probable contingency by which Allen could ever become the owner of so much stock, and this fact was well known to defendants.

If we concede that the New York house did buy the stock and pay for it, and receive the certificates, yet it is manifest these purchases were made, not on Allen's account, but on account of the Nashville house. They were charged to the Nashville house, and not to Allen; they were not

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kept separate and distinct from other purchases made by the New York house; no title to the stock vested in Allen; no delivery was made for his account; no stock was separated or held distinct by the New York house on Allen's account, and the purchases made could as readily have been held for account of any other customer as for Allen, and disposed of for any other instead of Allen.

This is very different from a case where stock is bought, directly or indirectly, in New York upon a specific order, and held in species to meet the demands of the buyer. In this latter event, the title to the stock vests in the purchaser, and it is held for him specifically, subject, it may be, to a pledge for the balance of purchase-money, and which may at any time be taken up by paying such balance and receiving the identical stock originally bought. Such a transaction is legitimate, though made largely upon a credit greater than the means of the customer would justify.

The case on trial is, at best, only a case where the Nashville house, having incurred a risk, has protected itself by a purchase in New York of a similar stock to meet this risk; but the stock is held by the New York house to protect the Nashville house, or for other reasons, and not on account of the customer.

In the case of *Irwin v. Willar*, 40 U. S. Rep., 499, 508, it was said: "Such a contract is only valid when the parties really intend and agree

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that the goods are to be delivered by the seller, and the price to be paid by the buyer; but if, under the guise of such a contract, the real intent is merely to speculate in the rise and fall of prices, and the goods are not to be delivered, but one party is to pay the other the difference between the contract price and the market price of the goods, it is nothing more than a wager, and is null and void.

"When, from the nature of the transaction and the manner and method of carrying on the business, it is apparent that it is the intention of the parties, though not expressed, that they should settle upon the basis of the market price, the losing party paying the difference, the contract would be a gaming contract, and void. 38 Am. Rep., 393; 39 Mich., 337; Cook on Stock Brokers, Sec. 457, foot-pages 444, 445."

As between the broker and his customer, the broker is held to be dealing as a principal, and not as an agent, in all stock gambling transactions. Cook's Law of Stock Brokers, Sec. 346.

It has been the constant aim of our Courts, and of the Legislature, to prohibit and prevent gambling, and from time to time laws have been enacted to meet the various forms which this great public evil has assumed.

By an Act of the General Assembly of 1883, Chapter 251, page 331, it was provided "that hereafter any sale, contract, or agreement for the sale of bonds, stock, grain, cotton, or other produce,

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property, commodity, article, or thing for future delivery, when either of the contracting parties, buyer or seller, is dealing simply for the margin, or on the prospective rise or fall in the price of the article or thing sold, and when either of said contracting parties have no intention or purpose of making actual delivery, or receiving the property or thing in species, shall be deemed, and is hereby declared, gambling."

Under this law, the *intention* of either *buyer* or *seller* may stamp the transaction as *gambling*. Its object was to suppress the evil, and to make each of the contracting parties responsible for the intent of the other. Prior to the passage of this Act, and without regard to it, it had been held to be gambling when *neither* party intended an actual delivery; but it was often found difficult to prove the intent of one party, and this Act was passed to enable the Courts to look beneath the mask and determine the real character of the transaction from either stand-point.

In the case of *McGrew v. City Produce Exchange*, 1 Pickle, 578, this Court said, in construing the Act of 1883: "This Act was intended to make it unlawful if either party had no intention of effectuating a real purchase or sale. It was designed to suppress the evil of dealing in futures, and to limit such operations to *bona fide* sales and purchases by those who wished to sell to those who wished to buy. In making the seller responsible for the intent of the buyer, and the

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buyer responsible for the intent of the seller, it intended to suppress gambling by confining the business of buying and selling for future delivery in such limits as would practically preclude the possibility of it. The *bona fide* dealer can still operate, but he cannot do so upon any terms which do not protect the community against the pernicious and ruinous speculation in the rise and fall of prices. He is obliged for his own safety, as this Act provides extreme penalties, to avoid the speculator, and buy only for the legitimate demands of necessity and trade."

We add to what has already been so well said, that there is no evil more demoralizing and pernicious in its tendencies and consequences than the spirit of reckless speculation which pervades so largely all sections of our country, and all classes of society. It inevitably leads to peculation, embezzlement, and other crimes. It crushes legitimate business, and creates an unhealthy excitement, which brings ruin as its result.

Numbers of cases of gambling contracts are no doubt being daily executed, to the great detriment of the public welfare, and but few of them find their way into the Courts, and while this Court does not presume to prescribe bounds in commercial ethics, nor to establish a protectorate over the public, nor, indeed, to enter the field of commercial politics and declare the credit system illegal, still it will, whenever a proper case arises, carry out the manifest intention of our laws to prohibit

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gambling, no matter what cloak or disguise may be thrown around it.

It is not the province of the Court to prevent trade, or even speculation, but it is its duty to draw the line between real transactions, which are legitimate, and sham transactions, which are gambling, and to protect society from the latter.

Now, what facts are developed in this case? We have a young man occupying an honorable and responsible position as bank teller, intrusted with the funds of the bank and its customers. Possessed with an unnatural desire to grow rich suddenly, he finds these defendants offering to him a field which he can enter for a comparatively small sum, and thereby become the ostensible owner and controller of stocks to an almost unlimited amount, subject to daily fluctuations, which, if favorable to him, would in one day realize for him more than he could earn in a year of hard labor at his legitimate work. Is it any marvel that he is induced to enter the inviting field? Now, would any respectable broker or bank have extended to this young man such extensive credit upon such small security upon any real transaction, or with any expectation or intention that the contract would be closed by a delivery of the stocks? We think not, and we are of opinion that, notwithstanding the stocks may have been bought in this case by the New York house, no title to such stock ever vested in Allen, or was ever intended so to vest, and we are further of opinion

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that it was neither the intention of Dunham & Co. to make delivery to Allen, nor of Allen to receive the stocks; but the transaction was simply a dealing on margin, and on the prospective rise and fall of stocks, and was gambling under the statute and without the aid of the statute.

We do not mean to be understood as holding that a man cannot buy upon a credit far beyond his ability to pay if he chooses to do so, but we do mean to hold that, to make such transaction legitimate, it must be real between the parties, and the buyer must by his purchase acquire some sort of title to the thing he buys, and some sort of beneficial interest in the specific thing that he does buy, and his ownership in that specific thing must appear and be recognized.

Allen had a right, under the statute, to recover the money paid by him upon these gambling transactions to the defendants. After the lapse of ninety days, that right inured to the benefit of his wife. Both of them have assigned their rights to the Capital City Bank, to re-imburse it for moneys embezzled to make these and similar transactions.

It is insisted that, as a consequence of this transfer, this suit is tainted with champerty and maintenance. We do not so consider it, but hold that, under the terms of the contract of transfer set out in the record, the bank has a right to recover upon this transfer as it would on any other collateral assigned to it.

It is insisted also that the bank, in considera-

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tion of this transfer, has agreed that it will not prosecute Allen for embezzlement, and has thus compounded a felony. We do not think this contention, as to the agreement with Allen, based on the record.

The consideration for the transfer is valid and legal. Even if there were an agreement not to prosecute Allen criminally (which we do not find from the record), this agreement, based upon the settlement of his embezzlement, would be a legal agreement and valid contract. Code (M. & V.), § 5474. This section embraces not only embezzlement of public funds, but funds of private individuals also. *Davis v. State* and *Cheek v. State*, Jackson, 1892.

We therefore hold that Allen and wife, for the use of the Capital City Bank, have a right to recover of defendants all such sums of money as were paid by him upon the several transactions had with them, with interest; and the decree of the Chancellor is reversed, and the cause remanded to the court below for proper account and decree for the repayment of same out of funds borrowed by defendants under the order in this cause.

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STATE v. REINHART.

(Nashville. February 22, 1893.)

1. COSTS. *Of attachment proceedings for witnesses in criminal cases, how taxed.*

The costs of attachment proceedings had in a criminal case to compel attendance of witnesses, if not adjudged against the witnesses, are taxable as costs of the cause in which the witnesses were required to testify.

Code construed: § 6453 (M. & V.); § 5577 (T. & S.).

2. SAME. *Same.*

And the defendant is liable, upon conviction, for costs incurred by reason of attachments for State witnesses, when the witnesses are exonerated from payment of costs.

FROM MONTGOMERY.

Appeal from the Criminal Court of Montgomery County. C. W. TYLER, J.

Attorney-general PICKLE for State.

Wm. M. DANIEL for Defendant.

LURTON, C. J. The defendant was convicted of horse-stealing. Certain witnesses for the State, and others for the defendant, were duly subpoenaed to appear and testify. They failed to obey the process of the Court. Thereupon, an order was entered,

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reciting that they were "under subpœna as witnesses in this case," and that they had willfully failed to appear, and "that attachments issue for them, and that they be brought into Court to testify, and be held in custody until they appear and testify." Attachments did accordingly issue, and the recalcitrant witnesses were arrested and brought into Court.

The record then recites that these witnesses did appear and testify under the attachments, "and that the Court being satisfied that, by reason of high water, they were unable to attend and testify yesterday, as summoned, it is ordered by the Court that they be discharged from custody."

The Court thereupon ordered that all the costs incident to the attachments be taxed against the defendant, "as part of the costs in this cause." It is now insisted that this was error, and that the costs incident to a proceeding by attachment against a witness is not properly costs of the cause in which he was summoned, but is costs in a separate and distinct proceeding, in the name of the State and against the witness, and should be taxed in the contempt proceedings. When a witness has been duly summoned, he is bound to appear in pursuance of the subpœna; and if he willfully neglects to appear, he is guilty of a contempt of the process of the Court, and may be proceeded against by an attachment. 1 Greenleaf on Evidence, Sec. 319.

This author says:

"It has sometimes been held necessary that the

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cause should be called on for trial, the jury sworn, and the witness called to testify; but the better opinion is that the witness is to be deemed guilty of contempt whenever it is distinctly shown that he is absent from Court with intent to disobey the writ of subpœna, and that the calling of him in Court is of no other use than to obtain clear evidence of his having neglected to appear; but that is not necessary if it can be clearly shown by other means that he has disobeyed the order of the Court." *Supra*, Sec. 319.

Code (M. & V.), § 4881, embodies this common law proceeding, and makes the willful disobedience "of any lawful writ, process, order, rule, decree, or command" of a Court a contempt, and authorizes the issue of an attachment for the offender.

In Caruthers' History of a Lawsuit it is said: "If the witness willfully fails to attend, it is a contempt of Court, and the party may have an attachment forthwith to bring him in, without any previous rule on him to show cause. * * * The Court must have satisfactory evidence of the willfulness of his absence—usually the affidavit of the party—to warrant an attachment." Sec. 307, old edition.

This remedy does not proceed upon the ground of any damages sustained by the party moving for the attachment, but is instituted to vindicate the dignity of the Court. 1 Greenleaf on Evidence, Sec. 319.

A witness failing to attend is liable to the party

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summoning him for all damages sustained by reason of his failure to appear and testify. In a civil case he is also liable to forfeit the sum of \$125, to be recovered by *scire facias*. Code (M. & V.), § 4574. In a criminal case the same remedy exists, the penalty for failure to attend being increased to \$250. Code (M. & V.) § 4575.

Neither of these remedies—the forfeiture of a penalty and the action for damages—may result in bringing the witness to testify in the particular case. They are the *private remedies of the parties injured by non-attendance*. The dignity of the Court is not vindicated by resort to them, nor is the testimony elicited. The attachment is resorted to in the case in which the contempt was committed, and for the double purpose of securing the evidence of the disobedient witness and to vindicate the Court. It is a proceeding incident to the principal cause, and the expense incident may properly be taxed as a part of the costs of the cause. The issuing of these attachments were but an incident to the trial of the defendant, and were necessary that the trial might proceed. The defendant was entitled, under the Constitution, to compulsory process for his witnesses, and the cost incident to such right is clearly costs in the cause. These costs might have been taxed to the disobedient witnesses, but when they purged themselves of contempt the costs properly became costs in the cause.

Section 6458, Code (M. & V.), provides that

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"the costs which may be adjudged in criminal cases include all costs incident to the arrest and safe-keeping of the defendant before and after conviction, due and incident to the prosecution and conviction, and incident to the carrying of the judgment or sentence into effect."

Under this provision, we think there was no error in taxing the costs incident to the attachment proceedings as costs of the cause.

Judgment affirmed.

Williams v. State.

WILLIAMS v. STATE.

(Nashville. February 23, 1893.)

1. GAMING. *Betting on horse-race run in another State.*

It is gaming, and punishable as a misdemeanor, to bet, or to promote betting, within this State, upon a horse-race to be run in another State, where it is lawful to bet on such race.

Code construed: § 5701 (M. & V.); § 4881 (T. & S.).

Act construed: Acts 1891, Ch. 115.

Case cited and approved: Ransome v. State, 91 Tenn., 716.

Code construed: § 5802 (M. & V.); § 4974 (T. & S.).

2. SAME. *Same.*

And the offense is consummated if the bet is commenced, and, *a fortiori*, if it is completed, within this State.

3. SAME. *Same.*

And the bet is not only commenced, but completed, in this State, by the resident agent of a non-resident firm engaged in obtaining bets on horse-races to be run outside this State, who, without soliciting, receives a proposition to bet upon such race, wires it to his principal for acceptance or rejection, and, upon its acceptance, issues a ticket to the better, and receives and forwards the stake to his principal, and pays off the winner by draft upon his principal.

FROM DAVIDSON.

Appeal from the Criminal Court of Davidson County. G. S. RIDLEY, Judge.

Williams *v.* State.

A. J. CALDWELL and VERTREES & VERTREES for Williams.

Attorney-general PICKLE for State.

WILKES, J. The three plaintiffs in error were each convicted on three separate presentments for gaming, the specific charges being unlawful betting, and encouraging and promoting unlawful betting, upon a horse-race run in the State of Kentucky. The cases were all heard together, before the Judge of the Criminal Court of Davidson County, without the intervention of a jury, and upon an agreed statement of facts. They were each found guilty in each case, and a fine was imposed in each case of \$50. All have appealed.

The substance of the agreed state of facts, so far as material to be set out, is as follows: Defendant Williams is proprietor of the "Climax Saloon," in Nashville. Payne & Co. live in Kentucky, and their occupation and business is the placing of bets on horse-races, to be run at Latonia race-course, in Kentucky. They have the rear room of the saloon building rented, and a wire leased from the Western Union Telegraph Company connects it with Latonia. An operator is stationed at each place. In this room there is a blackboard, on which is written the names of the horses in the different races to be run, the weight each is to carry, the jockeys who are to ride them, and the odds which the book-makers at Latonia are laying against them.

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Defendants McKay and Johnson are agents of Payne & Co., and attend to their business in this rented room. They receive propositions from any one offering to bet with Payne & Co., but solicit no propositions. The propositions, when offered, are telegraphed to Payne & Co., at Latonia, for acceptance or rejection. No propositions are entertained except upon actual races, and unless offered before the races come off. If Payne & Co. accept any proposition or offer to bet, they wire their Nashville agents to that effect. The Nashville agents thereupon receive the money which is offered to bet, and give to the party paying the same a ticket, which is the evidence, and contains the terms of the bet. The full amount of the bet is collected by the Nashville agents and remitted to Payne & Co. They also collect a commission for their services in forwarding the money. When the race is run at Latonia, the result is communicated by wire to the Nashville agents, and if the Nashville party has been successful, defendants, or one of them, draws a draft on Payne & Co., at Latonia, for the amount won, which the Nashville customer accepts in payment of his winnings. These drafts are collected in the usual course of trade. The Nashville agents act alone as agents of Payne & Co., receive a salary from them for their services, but have no interest in their business. The money received by the Nashville agents is regularly sent to Payne & Co., but not by telegraph, and settlement is made with them twice a week.

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Defendant Williams has no interest in the business, but has been in the habit of cashing the drafts on Payne & Co. when presented at his saloon bar. He has also himself sent propositions to Payne & Co. to bet, which were accepted, and he has full knowledge of the character of the business conducted by Payne & Co. and by McKay and Johnson.

The contract made with the Western Union Telegraph Company by McKay and Johnson and Payne & Co. provides that no bet, or proposition to bet, in Davidson County shall be accepted in this room, but all shall be transmitted to Payne & Co. for acceptance on some track where it is lawful to bet on horse-races; and a violation of this provision terminates the lease of the wire. Many of the propositions made are rejected.

Latonia is a licensed race-track in Kentucky, and it is lawful, under the laws of that State, to bet on races on that track.

The contention is made that, under these facts, no bets are made in Tennessee, but all propositions to that effect are positively declined; that propositions to bet are merely sent to Payne & Co., in Kentucky, and, if accepted, the contract becomes complete there, upon the acceptance, where it is not gambling to make such contracts; and that the winnings are paid off in Kentucky.

Plaintiffs in error insist there is a broad difference between this case and the case of *Ransome v. The State*, 7 Pickle, 716.

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Under the Code of Tennessee (M. & V.), § 5701, a bet on horse-racing is declared not to be gambling. This act was amended by Chapter 115, Acts of 1891, Section 1, so as to include trotting and pacing as well as running races.

Section 2 of the same Act provides "that it shall be unlawful gaming to bet or wager in any way upon any horse-race, unless the race-track upon which the race is run, trotted, or paced be inclosed by a substantial fence, and the bet or wager be made within said inclosure, upon a race to be run, trotted, or paced within said inclosure."

This Court, in *Ransome v. The State*, 7 Pickle, 716, held "that this Act only authorized betting on races *run in this State*, and within inclosures, and the betting must be done within the track inclosure." The object is to limit such gaming to the time and place where the race is being run. If the business done by defendants (say the Court in that case) is not gaming at the place where the money is put up on the race, but is to be held and treated as a bet made at the place to which the money is to be sent, and by the person for whom the agent acts, then there would be nothing unlawful in a "turf exchange" operating for principals on races run *without the State*, and thus gaming at all times, and on all races, run anywhere, would be licensed by resorting to the scheme shown by this evidence. The statute plainly intended to legalize betting done on a lawful track, and nowhere else.

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It is said the present case differs from the Ransome case, because in this case no bet is made in Tennessee, no winnings are paid here, and there is nothing done here, except to forward a proposition to bet to Kentucky, which does not become a contract until accepted in Kentucky, where it is legitimate.

If this is as contended, still we cannot see that the case is taken out of the rule as to gambling contracts. Here a proposition is made in Tennessee to bet on a race to be run out of the State. This would be gambling if completed here. The commission of the offense is commenced in Tennessee, even if consummated in Kentucky, and, under the plain provisions of the Code, § 5802, the offender is guilty of the offense commenced.

But under the facts as agreed on in this case, we are of opinion that the contract was not intended to be completed in Kentucky, and was not in fact consummated there, nor until the Kentucky parties had wired their willingness to accept the bet to the Nashville agents, and until they had communicated this fact to the Nashville customer. Until this is done, no money is paid by the customer, no ticket is issued to him; and until these things are done, it was not intended that the contract should be completed, and without these final transactions the bet would not have been effectuated or closed.

The telegram from the Kentucky principals to the Nashville agents is nothing more than an

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authority to the latter to close the deal on the terms proposed, and this closing of the deal is done in Nashville by the Nashville agents, after receipt of such authority from their Kentucky principals. The money to make the bet is then paid in Nashville, the ticket evidencing the contract is then signed and delivered, and the deal is completed there.

After the race is run, the winnings are paid in Tennessee, not in currency, it is true, but in a draft which the customer accepts as payment and treats as cash.

We are of opinion, therefore, that each of the defendants is guilty of illegal betting on races, not legalized by statute, and also guilty as aiders, abettors, and promoters of such illegal betting.

The judgments of the Court below will be affirmed with costs.

Clemons *v.* State.

CLEMONS *v.* STATE.

(*Nashville.* February 23, 1893.)

1. WITNESS. *Defendant in criminal case must testify as first witness for defense.*

Unless the defendant in a criminal case testifies on his behalf "before any other testimony for the defense is heard," his testimony cannot be heard at all. The rule requiring him to testify first for the defense is imperative, and admits of no exception. Oversight of counsel affords no reason for relaxation of the rule.

Act construed: Acts 1889, Ch. 79.

2. CRIMINAL PRACTICE. *Verdict of guilty sufficient, when.*

A verdict of guilty in a robbery case is sufficient in these words, to wit: "The jury, on their oaths, do say that the said George Clemons is guilty, in manner and form as charged in the bill of indictment, and fix his punishment at five years' confinement." The omission to name the place of confinement is not material, that being supplied by the law.

3. SAME. *Same. Judgment.*

And such verdict authorizes judgment that the defendant "be confined in the penitentiary of the State of Tennessee, at hard labor, for five years."

4. INDICTMENT. *For robbery sufficient, when.*

An indictment for robbery, sufficient in other respects, is good, although it contains no averment of ownership of the property taken.

Code construed: § 5380 (M. & V.); § 4631 (T. & S.).

Case cited and approved: *State v. Swafford*, 3 Lea, 162.

5. TERM OF IMPRISONMENT. *Begins from date of affirmance.*

A convict's term of imprisonment, where he takes an appeal, begins from the date of affirmance in this Court, and not from date of judg-

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ment in lower Court. There is no authority to imprison him in the penitentiary pending the appeal, even with his consent.

FROM HOUSTON.

Appeal in error from Circuit Court of Houston County. A. H. MUNFORD, Judge.

J. W. RICE, S. J. TAYLOR, and J. S. LEE for Clemons.

Attorney-general PICKLE for State.

CALDWELL, J. The plaintiff in error, George Clemons, is under sentence for robbery. His counsel insist upon a reversal and new trial for several reasons:

First.—After the State's evidence was closed, and two witnesses—Virgie Brown and Lou Brown—had been examined in behalf of the defendant, his counsel offered to put him on the stand as a witness for himself, “stating that he had intended introducing defendant as a witness, but by oversight had failed; that it, for the time, escaped his mind, and he never thought of it till Lou Brown was testifying; and that defendant would not testify on any subject that his two witnesses had testified on.” That offer of counsel, though supported by his affidavit, was refused, and the de-

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fendant was not permitted to testify. That action of the Court is now assigned as error.

The ruling of the Court was right. The only authority in this State for allowing a defendant in a criminal case to give evidence in his own behalf is found in Chapter 79 of the Acts of 1887; and that statute gives him the right to testify (Section 1) only *on condition* that he "shall do so before any other testimony for the defense is heard by the Court trying the case." Sec. 2.

The terms of the statute are so plain as to admit of but one construction; they are imperative, and must be enforced by the Courts in every case. The provision is that the defendant may be the *first* witness in his own behalf, but not the *second*, *third*, or *fourth*. He may testify at one particular stage of the case, but at none other, under any circumstances. This is the rule established by the positive words of the Act. The Legislature made no exception; the Courts can make none.

It follows that the defendant in the case at bar was not entitled to be heard at the time he was offered as a witness, and that the action of the trial Judge in refusing to permit him to testify was correct.

Second.—The verdict was in these words:

"The jury, on their oaths, do say that the said George Clemons is guilty, in manner and form as charged in the bill of indictment, and fix his punishment at five years' confinement."

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Upon that verdict the Court pronounced sentence, and adjudged that the defendant "be confined in the penitentiary of the State of Tennessee, at hard labor, for five years."

It is insisted that the judgment was unauthorized, because it did not follow the verdict, and that the verdict was of no effect because it did not state the place of confinement.

Neither of these objections is well taken. The verdict, though not so full as usual, was valid in form. A recital of the place of confinement was not indispensable to its validity. The law supplied the place, as all confinement for more than twelve months must, by statute, be in the penitentiary.

It was proper therefore for the Court, in the judgment, to state the place of confinement; and, in doing so, he did not depart from the verdict. The judgment pronounced by the Court was the proper judgment of the law upon the verdict as rendered.

Third.—It is insisted that the Court should have allowed defendant's motion in arrest of judgment, and discharged him, and that this Court should now do what the Court below failed to do in that respect.

This action is asked upon the proposition that the indictment, on which the conviction was had, is fatally defective, in that it does not state the ownership of the property charged to have been taken.

The averment of the indictment is that the de-

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fendant, at a certain time and place, "unlawfully, willfully, and maliciously made an assault in and upon the body of one James Lockhart, and then and there feloniously and forcibly did take from the person of the said James Lockhart, a pocket-book and twenty cents in silver coin, of the value of two dollars, by violence and by putting him, the said James Lockhart, in fear, to the evil example of all others in like case offending, and against the peace and dignity of the State."

From this quotation it is seen, at once, that the ownership of the property alleged to have been taken from James Lockhart is not laid in him, or in any other person. As to the matter of ownership, further than is to be inferred from the possession, the indictment is entirely silent.

Is that a fatal defect? We think not.

The statute declares that "robbery is the felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear." Code (M. & V.), § 5380.

And the indictment here contains all the words of the statute, or their full equivalent, and more besides.

In *State v. Swafford*, 3 Lea, 162, this Court held that an indictment for robbery under the Code is good if it charge the offense in the words of the statute defining it. It is true the indictment adjudged to be good in that case, laid the ownership of the property taken in the person

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from whom taken; but no importance was attached to that fact in the decision of the case. In the conclusion of the opinion in that case, the Court said: "The essential ingredients of the offense are the felonious and forcible taking from the person of another of goods of value by violence." The reasoning of the Court in that case is conclusive of this one.

Fourth.—Having disposed of the other matters of complaint orally, and finding no error in the records, the judgment will be affirmed, with costs.

Fifth.—The defendant now asks that his term of imprisonment be adjudged to have commenced at the time of the judgment in the Court below.

The record recites that the defendant prayed and obtained an appeal from the judgment below, and that he thereupon "proposed to go at once to the penitentiary to serve on his time till the meeting of the Supreme Court;" that "the Court declined to order the defendant to the penitentiary without he abandoned his appeal, because there was no warrant under the law to hold a person in the penitentiary, except under final judgment;" and that "the defendant refused to abandon his appeal."

The action of the trial Judge was right, and is sustained by the reason he assigned at the time.

The end sought by the defendant could have been accomplished, as is sometimes done, by submitting to the judgment of the lower Court with-

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out appeal, and bringing the record into this Court by writ of error. Having failed to pursue that course, defendant's term must begin as that of any other plaintiff in error whose conviction is affirmed in this Court.

Porterfield *v.* State.

PORTERFIELD *v.* STATE.

(Nashville. February 23, 1893.)

1. FEES. *Policeman entitled to fifty dollars for arrest and conviction for carrying bowie-knife.*

A policeman, having authority under a city charter to make arrests for offenses against the State laws, is entitled, upon rendering the required service, to the fee of fifty dollars, allowed by statute, to "any civil officer who shall arrest and prosecute to conviction and punishment any person guilty of any of the offenses" enumerated in the Act for the suppression of the sale and use of bowie-knives.

Code construed: §§ 5522-5526 (M. & V.); §§ 4746-4750 (T. & S.).

2. SAME. *Same. Salaried policeman entitled to this fee.*

And the policeman is entitled to this fee, although he may, at the date of rendering the required service, be employed by the city upon a salary.

3. SAME. *Same. What amounts to an arrest and prosecution.*

And the policeman has rendered the service for which said fee is allowed when he arrests a person upon the charge of carrying a bowie-knife, has him bound over to court, where, upon evidence furnished by the officer, he was indicted and afterwards plead guilty, without trial, and was sentenced to fine and imprisonment.

FROM DAVIDSON.

Appeal in error from Criminal Court of Davidson County. JOHN D. BRIEN, Sp. J.

Porterfield *v.* State.

LYTTON TAYLOR for Porterfield.

Attorney-general PICKLE and E. J. WICKWARE for State.

CALDWELL, J. Only a question of costs is to be decided in this case.

It satisfactorily appears, from the imperfect record before us, that T. T. Russell and C. V. Gohn, members of the police force of Nashville, arrested Sam Porterfield and carried him before the City Recorder on the charge of carrying a bowie-knife; that the Recorder bound him over to the Criminal Court of Davidson County; that in said Court he was indicted for said offense on the evidence of said Russell and Gohn; and that, thereafter, when arraigned for trial, they being ready to testify against him, he pleaded guilty to the indictment, and was adjudged to suffer imprisonment in the county work-house for a period of three months, and to pay a fine of \$200, and all costs.

After the judgment was rendered, Russell and Gohn moved the Court to direct that \$50 be taxed in the bill of costs, in their favor, jointly, for having arrested and prosecuted the defendant.

The motion was overruled, and they appealed in error.

In January, 1838, was passed "An Act to suppress the sale and use of bowie-knives and Arkansas tooth-picks in this State." The Act contained five sections. The first one prescribed a penalty for selling or giving away, the second for wearing,

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the third for drawing, and the fourth for using a bowie-knife, Arkansas tooth-pick, or other like weapons. The fifth section provided, among other things, that "any civil officer who shall arrest and prosecute to conviction and punishment any person guilty of any of the offenses enumerated in this Act, shall be entitled to the sum of fifty dollars, to be taxed in the bill of costs." Acts 1837-38, Ch. 137; Nicholson's Statutes, pages 129, 130; Code, §§ 4746, 4747, 4748, 4749, and 4750.

Porterfield was arrested, indicted, and convicted for a violation of the second section of that Act, being § 4747 of the Code; and Russell and Gohn claim the fifty dollars under the fifth section—Code, § 4750.

We think the claim is well made, and that the motion should have been allowed, and the taxation directed by the Criminal Judge.

Russell and Gohn were "civil officers" within the meaning of the statute. They were policemen, appointed and charged, under and by the charter of the city, to "preserve the public peace, prevent crime, detect and arrest offenders," and to "enforce every law relating to the suppression and punishment of crime." Acts of 1883, Ch. 114, Sec. 51.

They were civil officers in a very important sense. Though not primarily officers of the State, they were so secondarily, being officers of a municipality, which was itself an arm of the State government.

Porterfield *v.* State.

Being civil officers, the services rendered by Russell and Gohn entitled them to the \$50, notwithstanding the fact that Porterfield pleaded guilty and judgment was pronounced against him without the usual formalities of a trial. They arrested him, in the first instance, for the specific offense charged; they furnished the evidence by their own testimony, upon which he was indicted, and by standing ready to testify against him upon the trial no doubt induced him to plead guilty. That makes a case of "arresting and prosecuting to conviction." There was no less a *prosecution* and a *conviction* because a plea of guilty was entered. The offender was as effectively prosecuted and convicted as if the State had established her case by the fullest proof.

The fact that these policemen were "salaried officers" of the city, is no bar to their demand in this case. They were *civil officers*, and performed the *requisite service*. That gave them a right to have the \$50 taxed in the bill of costs. The statute makes no exception as against officers who may be provided with a stated salary, and the Courts can make none. If the *requisite service* has been rendered by a civil officer, the taxation in his favor follows as a matter of law.

Reverse and remand for judgment in accordance with this opinion.

Wheless v. Wheless.

WHELESS v. WHELESS.

92	293
110	215

(Nashville. March 2, 1893.)

EQUITABLE CONVERSION. *Of realty into personality not effected, when.*

Equitable conversion of land into personality is not effected so that it will pass to the distributee, and not to the heir, of the owner upon his death intestate, where the land had been conveyed to a trustee for the benefit of a syndicate of speculators composed of the intestate and several others, by a deed providing that each member of the syndicate should pay his due proportion of the purchase-price of the land, and that the trustee should have "power and authority to hold, possess, and manage the same, in their interest and behalf, and to sell and convey the same by deed in fee-simple, upon the written direction of a majority in value of the adult beneficial owners then living, upon such terms and conditions as they may direct, and to collect and divide the proceeds of sale among said beneficiaries, their heirs, administrators, executors, and assigns as their several interests may appear." And providing, further, that "the aforesaid sum of \$34,395.60 (the purchase-price) has been paid and secured to be paid as follows: * * To secure the payment of the promissory notes herein described, a lien is expressly retained upon the share or interest of the maker alone and not against the tract as a whole. In case any of the beneficiaries herein named, in order to preserve his or their own title, should have to pay and discharge for another any accruing taxes or other incumbrance or lien upon the whole property, then, in that event, he or they shall have a lien upon the share or interest of the person who has failed to make such payment." And, providing further, that the trustee may resign "with the consent and approval, in writing, of a majority in value of the adult beneficial owners named above, and appoint in his room and stead a new trustee, and clothe him with like power and duties as those now conferred on him by a suitable deed of conveyance, in writing, to be recorded," etc. This deed does not contain that clear, imperative, and unconditional direction for sale of the land which is essential to equitable conversion.

Cases cited and approved: Stephenson v. Yandle, 3 Hay., 109; McCormick v. Cantrell, 7 Yer., 615; Williams v. Bradley, 7 Heis., 58;

Wheless *v.* Wheless.

Green *v.* Davidson, 4 Bax., 488; 19 N. J. Eq., 375; 70 Wis., 19; 95 N. Y., 598.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County. J. A. CARTWRIGHT, Sp. Ch.

JOSEPH WHELESS, JR., and N. D. MALONE for Complainants.

DICKINSON & FRAZER, STOKES & STOKES, and FRIZZELL & ZARECOR for Defendants.

G. N. TILLMAN, guardian *ad litem*.

J. S. PILCHER for widow of J. F. Wheless.

J. W. BYRNES for McCrosky.

CALDWELL, J. Gen. John F. Wheless died, intestate and without issue, leaving a widow and numerous collateral kindred. The bill in this cause was filed for a partition of his lands, where that could be done, and for sale and division of proceeds, where partition in kind might not be practicable.

The widow, in her answer, claimed that the undivided interest of her husband in what is known as the Baxter Smith tract was not realty,

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but personal property, under the doctrine of equitable conversion, and that it therefore belonged to her, as distributee, and not to the heirs.

The Chancellor decided this question against her, and she appealed.

No doctrine is more firmly fixed in English and American jurisprudence than that of equitable conversion, by which, under certain circumstances, real estate is treated in equity as personal property, and personal estate as real property.

Through this doctrine, Courts of Equity treat as land money directed to be employed in the purchase of land, and as money land directed to be sold and converted into money; and the direction upon which the conversion arises may be made by will, or by deed, settlement, or other contract *inter vivos*. Adams' Equity, * 135, 136; 1 Pomeroy's Eq., Sec. 371; 1 Story's Eq., Sec. 790; 4 Am. and Eng. Ency. of Law, 127; 6 Am. and Eng. Ency. of Law, 664, 665.

It was early recognized in this State (*Stephenson v. Yandle*, 3 Haywood, 109), and has since been applied in several cases upon the construction of wills. *McCormick v. Cantrell*, 7 Yer., 615; *Williams v. Bradley*, 7 Heis., 58; *Green v. Davidson*, 4 Bax., 488.

The difficulty which sometimes arises in the application of the principle to a particular instrument, lies not in the subtlety of the principle itself, but rather in ascertaining the intention of the maker from the words employed.

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To operate as a conversion, the direction that the form of the property be changed must be *imperative*, in the sense of being positive and unmistakable. If the intention, as gathered from the whole instrument, be left in doubt, or the direction allows the trustee to sell or not, as he deems best, the Courts are not at liberty to say that a conversion has taken place, but must deal with the property according to its actual form and character. 2 Story's Eq., Sec. 1214.

Mr. Pomeroy says: "No express declaration in the instrument is needed that land shall be treated as money; although not sold, or that money shall be deemed land, although not actually laid out in the purchase of land. The only essential requisite is an absolute expression of an intention that the land *shall be* sold and turned into money, or that the money *shall be* expended in the purchase of land. * * * The true test in all such cases is a simple one: Has the will or deed creating the trust absolutely directed, or has the contract stipulated, that the real estate be turned into personal, or the personal estate be turned into real?" 3 Pomeroy's Eq., Sec. 1159.

Again, "the whole scope and meaning of the fundamental principle underlying the doctrine are involved in the existence of a *duty* resting upon the trustees, or other parties, to do the specified act; for unless the equitable *right* exists, there is no room for the operation of the maxim, 'Equity regards that as done which ought to be done.'

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The rule is therefore firmly settled that, in order to work a conversion *while the property is yet actually unchanged* in form, there must be a clear and imperative direction in the will, deed, or settlement, or a clear, imperative agreement in the contract, to convert the property—that is, to sell the land for money or to lay out the money in the purchase of land. If the act of converting—that is, the act itself of selling the land, or of laying out the money in land—is left to the option, discretion, or choice of the trustees or other parties, then no equitable conversion will take place, because no *duty* to make the change rests upon them. It is not essential, however, that the direction should be *express* in order to be imperative; it may be necessarily implied. * * * If by express language, or by a reasonable construction of all its terms, the instrument shows an intention that the original form of the property shall be changed, then a conversion necessarily takes place." *Ib.*, Sec. 1160.

To the same effect are *Wait's Ex'rs v. Page*, 19 N. J. Eq., 375; *Ford v. Ford*, 70 Wis., 19; *Hobson v. Hale*, 95 N. Y., 598.

Numerous other authorities, text-books, and judicial decisions are at hand, but they are, in the main, so harmonious and so entirely in accord with the full quotation just made from Mr. Pomeroy, that we forbear to make further citations with respect to the character of direction neces-

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sary to work the notional change and call the doctrine of equitable conversion into play.

As a matter of some moment on the question of construction, it is well to observe that, unless the sale or purchase contemplated is expressly directed to be made at a specified time in the future, or upon the happening of some particular event, which may or may not happen, the conversion takes place, in wills, as from the death of the testator, and in deeds and other instruments *inter vivos*, as from the date of their execution. 3 Pomeroy's Eq., 1162.

The instrument upon which the controversy arises in this cause is a deed, in the following language:

"We, Baxter Smith and wife, Bettie G. Smith,
* * * * in consideration of the sum of
\$34,395.60, paid and secured to be paid as herein-after mentioned, have bargained and sold, and do hereby transfer and convey, unto James H. Yarbrough, in trust, as hereinafter mentioned, the following tract of land: * * * *

"To have and to hold for himself and other beneficiaries hereinafter named, in trust for the following uses and purposes—that is to say, said tract of land has been jointly purchased by James C. Warner, Percy Warner, John P. White, John F. Wheless, B. F. Wilson, W. M. Grantland, Chas. L. Ridley, Baxter Smith, and J. H. Yarbrough, L. H. Davis, and G. A. Maddux, the last three purchasing as a firm, under the firm name and style

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of Yarbrough, Maddux & Davis, each paying and to pay one-tenth of the purchase-money for said land, as hereafter set out, except John P. White, who pays two-tenths; * * * * * said tract of land is conveyed to said J. H. Yarbrough, as trustee for said named purchasers, with power and authority to hold, possess, and manage the same in their interest and behalf, and to sell and convey the same by deed in fee-simple, upon the written direction of a majority in value of the adult beneficial owners then living, upon such terms and conditions as they may direct, and to collect and divide the proceeds of sale among said beneficiaries, their heirs, administrators, executors, and assigns, as their several interests may appear.

* * * * * The aforesaid sum of \$34,395.60 has been paid and secured to be paid as follows: * * * * * To secure the payment of the promissory notes herein described, a lien is expressly retained upon the share or interest of the maker alone, and not against the tract as a whole. In case any of the beneficiaries herein named, in order to preserve his or their own title, should have to pay and discharge for another any accruing taxes or other incumbrance or lien upon the whole property, then, in that event, he or they shall have a lien upon the share or interest of the person who has failed to make such payment. Should said J. H. Yarbrough desire to resign the trust herein given him, he may do so by and with the consent and approval, in

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writing, of a majority in value of the adult beneficial owners named above, and appoint in his room and stead a new trustee, and clothe him with like power and duties as those now conferred on him, by a suitable deed of conveyance, in writing, to be recorded in the Register's Office of Davidson County, Tennessee."

Such are the material portions of the instrument the Court is called upon to construe in this case; and the inquiry is, whether the land conveyed thereby is to be treated in equity as realty or as personalty. If as realty, the share of General Wheless passed to his heirs under the statute of descent; if as personalty, it went to his widow as sole distributee, subject in either case, of course, to his debts.

A general view of the deed readily discloses a proposed speculation entered into by several persons jointly—a syndicate buying land to sell again. In furtherance of the scheme, a trustee was appointed and the land conveyed to him for the benefit of all the purchasers, for each of them according to his interest.

The idea of a resale, as the ultimate object of the enterprise, runs through the whole instrument. It appears from the nature of the transaction, from the words conferring upon the trustee power and authority "to sell * * * and collect and divide the proceeds," and from the provision for appointment of successor in case the trustee should resign, that a partition in kind should ever occur, or

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that the trust should cease before a sale of the land and division of its proceeds were fully accomplished, was never contemplated. The land was bought to sell again, and a trustee was appointed as a part of the plan.

All this is clear; but it is entirely consistent with the proposition that the trust was created merely as a cheaper and more convenient method of preserving and conveying the land.

More is required to make a case of equitable conversion. The fact of a contemplated resale is present in every purchase of land upon speculation, and land purchased with such view is not converted into personality by the mere appointment of a trustee to receive the title, and as the agency through which the resale is to be accomplished for the owners.

It is manifest that the paramount object of the enterprise was a resale of the land, through the trustee as representative of the beneficial owners; yet the deed does not contain any imperative direction that he *shall* sell. No absolute, unconditional *duty* to sell is placed upon him; "the equitable *ought*" is not to be found in the deed, either as a matter expressed or to be necessarily implied. Not only does it contain no positive direction that he *shall* sell, but it, in reality, does not even *permit* him to sell upon his own motion. His only power of sale is made to depend, expressly, upon the direction of others. He has no independent authority in that respect. The words

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of the deed, on this point, are: "With power and authority to hold, possess, and manage the same in their interest and behalf, and to sell and convey the same by deed in fee-simple upon the written direction of a majority in value of the adult beneficial owners then living, upon such terms and conditions as they may direct."

This language imposes upon the trustee no positive, unqualified *obligation* to sell the land *at all events*. At most it but gives him *authority to sell*, at such time and upon such terms and conditions as others may direct. In effect it but makes him the instrumentality through which a majority of the beneficial owners, living at any given time, may make a sale. He has no right to sell without their written direction, and no authority to demand or require such direction at one time or another. It cannot be that a conversion was wrought by the creation of a trustee so passive as this one is.

To meet the fact that the trustee has no power to sell, unless directed by a majority of the adult beneficiaries to do so, it is suggested that the beneficiaries themselves are clothed with a trust, to the extent of being empowered to direct when and how the sale shall be made, and that they are bound to give such direction.

There can be no doubt that it was contemplated that the beneficiaries should, at some time, give the trustee the required direction to sell the land, and that a duty was, to that extent, indirectly

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devolved upon them; but that can hardly be said to have made trustees of them, or to have magnified the limited power of the real trustee into an imperative obligation to convert the land into money.

The purchasers, though intending an ultimate sale, clearly had no thought that the terms of the deed changed the character of the property, and converted the real estate into personalty. That they intended the land to be held as realty until actually sold and turned into money, is manifest from the general frame and terms of the deed, and especially from those parts of it retaining separate liens in favor of the grantor, and providing for a special lien in favor of such beneficiaries as might be compelled to pay taxes or discharge liens for others. In the portions of the deed last referred to, the interest of each of the several beneficiaries is referred to as an interest in *land* as such, and provisions are made with reference thereto which would be inappropriate as applied to personalty.

We are of opinion that the deed shows upon its face, when considered as a whole, that the land was conveyed to a trustee merely for convenience, and to save expense and trouble in the ultimate sale and conveyance, and that no conversion took place.

Our attention has been called to the very instructive and soundly-reasoned case of *Crone v. Bolles*, — N. J. Eq., — (reported in 24 Atlantic

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R., 237), in which a conversion of land into money was held to have occurred under direction contained in a will. There are several points of similarity between that case and this one, and perhaps as many important differences. The principles of law laid down in that case are the same recognized and applied by us in this one, the difference in result reached being due to difference in purport of instruments construed. Without stating the aspects in which the two instruments agree, or those in which they differ, we are content with simply saying that the Court in that case said that *the direction for sale was "imperative," and did not depend on the "request or consent"* of the testator's children, while in this case there is no imperative direction to sell, and the power to sell does depend on the direction of the beneficiaries.

Affirm the decree.

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THOMPSON *v.* BAXTER.

(Nashville. March 2, 1893.)

MECHANICS' LIEN. *Architect not entitled to.*

An architect has not, under our statutes, a mechanics' lien upon a lot and the buildings erected thereon for the value of services rendered by him under contract with the owner in drawing plans, making estimates, and soliciting bids for the buildings and superintending their erection.

Code construed: §§ 2739, 2740 (M. & V.); §§ 1981, 1981a (T. & S.).

Cases cited: Burr *v.* Graves, 4 Lea, 557; Kay *v.* Smith, 10 Heis. 43; Luter *v.* Cobb, 1 Cold., 528; Alley *v.* Lanier, 1 Cold., 540; McLeod *v.* Cahill, 7 Bax., 199; Dunn *v.* McKee, 5 Sneed, 658.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.

ANDREW ALLISON. Ch.

BARTHELL & KEEBLE for Thompson.

J. H. ACKLEN for Baxter.

H. PARKS for Insurance Company.

A. D. BRIGHT, Sp. J. The defendant, Baxter, the then owner of the lots described in the pleadings, employed plaintiff, Thompson, as supervising architect, to draw plans, specifications, solicit bids for,

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and supervise the construction of the building and erection of the house on same known as "Baxter Court" and "Baxter Court Hotel." The complainant alleges he is an architect, residing in Nashville. He now, by his bill, alleges that he is entitled to a mechanics' lien on said house and lot for his services, or compensation for services, rendered as such supervising architect, under §§ 2739 and 2740 of M. & V. compilation of the laws of Tennessee.

Section 2739 provides: "There shall be a lien upon any lot of ground or tract of land upon which a house has been constructed, built, or repaired, or fixtures or machinery furnished or erected, or improvements made by special contract with the owner or his agent, in favor of the mechanic or undertaker, founder or machinist who does the work or any part of the work, or furnishes the materials or any part of the materials, or puts thereon any fixtures, machinery, or material, either of wood or metal."

Section 2740 provides: "The benefits of § 2739 shall apply to all persons doing any portion of the work, or furnishing any portion of the material for the building, contemplated in said section."

The mechanics' lien is favored by the Legislature, and should not be hazarded by niceties in its enforcement. 4 Lea, 557.

However, the law is strict in its requirements that the claimant shall make it to clearly appear that he has a lien; but when that appears, the

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remedial laws for its enforcement are to be liberally construed. 10 Heis., 43; 1 Cold., 528-541; 7 Bax., 199; 5 Sneed, 658.

This lien is purely statutory, and unknown to the common law. Only those enumerated and embraced in the statute are entitled to the lien. A liberal construction of the mechanics' lien law does not mean that they shall be liberally construed in embracing or including others than those enumerated in the statutes. It must clearly appear that the claimant has a lien. No one is entitled to the lien unless the statute includes him or them. They are not to be included by strained construction. Unless the statute gives the lien, the party has none.

Now, does the statute embrace, include, or give this lien to a supervising architect? Is he a mechanic, undertaker, founder, machinist, or contractor? Has he done any work in building the house? Has he furnished the material, or any part thereof, or has he put in any fixtures, machinery, or material, either of wood or metal? We think not. A supervising architect is not a mechanic, nor is he a contractor in the sense of the statute. He simply draws plans, makes estimates, solicits bids, and supervises the erection of the building. The statute clearly does not embrace or include supervising architects. It makes no provisions for him. it does not give him this lien, and hence the Courts cannot.

We have been referred to a number of cases

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from other States, some holding, under their statutes, that a supervising architect has this lien, others holding the contrary. The weight of authority and the reasoning seems to be that a supervising architect has not this lien. But, be this as it may, we hold that under our statutes he has no lien upon the house or lot as supervising architect. The Chancellor decreed differently. In doing so we think he was in error, and the decree declaring and decreeing the lien is reversed and the attachment discharged.

Complainant insists that in the event that the Court should hold that he was not entitled to his lien, that he is entitled to have the deed set aside from Baxter and wife to Baxter Court corporation for fraud, etc., and property sold to satisfy his decree, he having sought, by his bill, an attachment on this ground as well as to enforce mechanic's lien, etc. There was no decree by the Chancellor on this feature of the attachment, nor is there any appeal by complainant for his failure to do so, nor is there any proof in the record of this fraud, etc. The whole case on the attachment seems, by the Chancellor and all parties, to have proceeded upon the theory alone as to whether complainant had a lien as supervising architect.

The decree of the Chancellor, as modified herein, will be affirmed.

The complainant will pay the costs of the appeal.

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DISSENTING OPINION.

LURTON, C. J. I am constrained to dissent. While § 2739 enumerates the persons entitled to the lien, yet § 2740 extends the lien to "*all persons doing any part of the work.*" There is no limitation by enumeration. If the complainant did "*any part of the work,*" he is within the extension of the Act. Neither is there any limitation to those doing actual manual work, as the laying of brick, the joining of wood, the cutting of stone. The "*boss,*" or "*foreman,*" under a contractor, or subcontractor, whose business it was to oversee and direct the labor of others, would be secured as a person "*employed by such contractor,*" etc., and entitled to the benefit of the lien just as much as a carpenter, brick-layer, or hod-carrier, though he did not personally do any of these things. The architect employed to draw plans, and *supervise the erection of the building,* is a person doing "*a part of the work,*" just as clearly as the laborer whom he supervises. The proof shows that Thompson personally, by day and by night, supervised this work, and I think him within the statute.

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(*Nashville. March 4, 1893.*)

1. BANKS AND BANKING. *Cashier's liability.*

A bank cashier who, without authority or necessity, employs an assistant on his own account, is liable for moneys of the bank fraudulently embezzled by such assistant while thus employed, upon the suit of the bank, its assignee, or successor—the cashier having fraudulently concealed the fact of such embezzlement after it came to his knowledge, and the successor having purchased the bank's entire assets, subject to its liabilities, without knowledge of the embezzlement.

2. SAME. *Same.*

A bank cashier is held to the exercise of reasonable care, skill, and diligence in the discharge of his duties. He becomes personally liable to the bank for losses resulting from loans negligently made by him to insolvent parties.

Cases cited and approved: Wallace *v.* Bank, 89 Tenn., 643.

3. STATUTE OF LIMITATIONS. *Fraudulent concealment of cause of action.*

The statute of limitations does not run against a cause of action fraudulently and effectively concealed from the party entitled to sue thereon by the party subject to suit during the time of such concealment. Example: A bank cashier became personally liable to his bank for the fraudulent embezzlement of the bank's funds by his assistant. He fraudulently concealed the cause of action for more than six years after it occurred, from the bank, its assignee and successor.

Held: The statute of limitations did not run during such concealment of the cause of action.

4. SAME. *Same. Knowledge of director not chargeable to corporation.*

And, in such case, the bank is not chargeable with the knowledge of the embezzlement by one of its directors who colludes with the de-

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linquent cashier in fraudulently concealing the facts from the officers and the other directors of the corporation.

FROM WILSON.

Appeal from Chancery Court of Wilson County.
GEO. E. SEAY, Ch.

E. E. BEARD and W. R. CHAMBERS for Vance.

STOKES & STOKES for individual creditors of S. T. Mottley.

J. N. MCKENZIE and R. P. McCLAIN for assignees of Bank.

A. D. BRIGHT, Sp. J. The original bill in this cause was filed in the Chancery Court at Lebanon to wind up the estate of S. T. Mottley, deceased, as an insolvent estate.

This is an appeal from a decree under a cross-bill filed in the said cause October 21, 1890, by Sanders and McKenzie, trustees of the National Bank of Lebanon and of the Bank of Middle Tennessee, in which they seek to hold the estate of S. T. Mottley liable for a defalcation in the first named bank, upon the ground that said default was occasioned by the negligent, careless, reckless, and fraudulent manner in which said Mottley, as

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cashier and sole manager of said bank, operated the same, in placing in said bank without authority or necessity his nephew, S. M. Anderson, who, through a series of years, abstracted from said bank sums of money, amounting, on March 31, 1881, to the sum of \$29,143.15, and that the same was accomplished by reason of said Cashier Mottley's reckless and careless management of said bank; that in March, 1881, A. W. Vick, the book-keeper and teller of said bank, discovered said default, and called the cashier's attention to it; but instead of Mottley, cashier, taking any steps to secure the bank, he entered into a fraudulent and corrupt arrangement with said Vick, who was teller and book-keeper, as well as a director, in said bank, and the only party, except Mottley and his nephew, who knew of said default, to conceal it from every one, under a promise from said Mottley to pay the same to the bank; that, under this arrangement, the books of the bank were falsified, false statements and reports of the bank's financial condition were made out regularly and sworn to by Mottley, cashier, said Vick, as Notary Public, swearing Mottley to the same, and said statements were published and circulated for the purpose of covering up and concealing the default; and by reason of said fraudulent collusion of Mottley and Vick the defalcation did not become known to the stockholders or other officers or patrons of the bank until after the death of said Mottley, in the spring of 1890; that Mottley

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and Vick resorted to every device to fraudulently conceal said default from officers and directors of the bank, as well as all other persons, until after Mottley's death.

The trustees also claim the right to sue for this default for the second named bank, because in 1886 the National Bank of Lebanon ceased to do business; that the Bank of Middle Tennessee was organized with the same officers and stockholders of the National Bank, and, under Mottley's directions, assumed and paid the liabilities of the National Bank, and was entitled to the assets of the National Bank, which were not turned over to said bank by said Cashier Mottley.

The defense of the administrator of Mottley's estate is: That he was not guilty; that complainants' (Sanders and McKenzie, trustees) right of action is barred by the statutes of limitation. On this last defense—viz., that they were barred by the statutes of limitation—the Chancellor denied cross-complainants the relief sought by their bill.

The Chancellor decrees as follows:

As to the claim on the part of cross-complainants for the alleged deficit of \$29,143.15, in the assets of the National Bank of Lebanon, and for which it is sought to hold the estate of S. T. Mottley personally liable, the Court disallows it, holding that, independent of any other defenses set up as against this item, the plea of the statute of limitation is sufficient; that it was conceded that the deficit and default occurred prior to April,

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1881; that it was then discovered by Vick, the teller, book-keeper, and a director at the time in the bank; that it came to his knowledge while acting in all of these capacities, and while in the active discharge of his duties in connection with the bank; that each and every director is the agent of the bank under such circumstances, and notice to one is notice to the bank; that the fact that at Mottley's behest Vick concealed it from his co-directors does not affect the question. It may have been bad faith in him, but it was none the less notice to the bank, for which he was director and agent. More than six years had elapsed when this suit was instituted, and the claim is barred by the statute of limitations.

To this part of the decree cross-complainants except, and insist that the Chancellor erred in so holding.

They also seek by their cross-bill to hold Mottley's estate liable for certain loans made to various parties that were insolvent, and so known to Mottley, the cashier, and the same are uncollected and worthless. The Court held that Mottley, as cashier, in making loans and discounts, was bound to exercise reasonable skill, care, and diligence. If he failed in this, and the bank suffered damages in consequence, he was liable. That branch of the case was referred to the Master for report. In the Master's report Mottley's estate is charged with various debts that were lost by his negligence. Exceptions to these items were overruled by the

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Court and the report confirmed, from which Mottley's administrator appeals and assigns errors.

In January, 1866, the National Bank of Lebanon was chartered under the national banking Act. Its charter expired January, 1886. There were five stockholders of this bank, who were its directors. The capital stock was \$50,000, S. T. Mottley owning \$38,000, who was also cashier, Major Vick owning \$1,000, W. R. Schaver \$1,000, R. P. McClain \$1,000, and Judge Green \$9,000, as trustee, etc. Major Vick was the teller. Mottley, the largest stockholder and cashier of this bank, managed and controlled it. Mottley placed in the bank his nephew, Anderson, as clerk, etc., without salary from the bank, but under the employment of Mottley, his uncle, who personally paid his salary. On March 31, 1881, the teller, Vick, discovered that there was a defalcation of \$29,143.15, and he told the cashier, Mottley, of the same, who ordered him not to let any one know of this shortage, but to keep same a secret, which Vick did until 1890, when he told R. P. McClain of it. Mottley nor Vick ever disclosed this shortage or default to the other directors, but covered up this fraud, and made fraudulent balance-sheets, made false and fraudulent publications of the condition of the bank from time to time, made false and fraudulent statements in regard to the condition of the bank to the bank examiner. This shortage or defalcation was alleged to be due to Anderson, Mottley's clerk. Mottley

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knew of it, and promised, or rather told, Vick that he would make it good, but failed to do so.

In 1886 the charter of this bank expired, and the stockholders chartered and organized the Bank of Middle Tennessee. The capital stock of this bank was \$25,000, of which S. T. Mottley owned \$13,000, Vick, Schaver, and McClain \$1,000 each, and Judge Green \$9,000. Mottley was made cashier of this bank. Upon the organization of this bank, the stockholders and directors, being the same as in the National Bank, it was agreed that the new bank (the Bank of Middle Tennessee) was to take all the assets of the old bank, the National Bank, and assume all the liabilities of the old bank, pay its debts, etc., which was done; the said Green, McClain, and Schaver still not knowing of the fraud still being practiced upon them by Mottley and Vick, all the time believing that the old bank was entirely solvent, and, having no knowledge of the defalcation or loss of said \$29,143.15, they still having the most implicit confidence in Mottley and Vick. Mottley being by far the largest stockholder, and reputed wealthy and of good character, no suspicion rested upon him nor upon Vick. Mottley managed the bank to suit himself, consulting none of the other directors.

In the spring of 1890 Mottley died, and thereupon R. P. McClain was elected cashier, and accepted the position, wholly ignorant of the true condition of the bank; and while in the discharge of his duties as a faithful officer, seeking out the

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assets of the bank, when Vick, who was still teller of the bank, disclosed this shortage to McClain, who at once notified the other directors, and the bank closed and made the assignment to Sanders and McKenzie.

Mottley and Vick knew of this loss of the \$29,143.15 as early as March, 1881, and, by agreement, kept this information from the other directors; by false and fraudulent schemes, devices, and false entries upon the books of the bank, by false reports and sworn statements, fraudulently concealed this shortage from the other directors. The other directors, nor, indeed, any one could, except by a thorough and minute examination of the books of the bank, discover this loss.

The proof in the record abundantly establishes the fact that this money was lost by the gross negligence of Mottley; that he fraudulently concealed this loss, and took no steps to recover it; that he continued this fraud and concealment, and perpetrated a gross fraud upon the new bank when, by express agreement, it was to take the assets of the old bank, and assume its liabilities. The new bank did this, believing that the assets and liabilities were as represented by Mottley.

It is insisted that the statutes of limitation began to run in favor of Mottley on March 31, 1881, when the loss was first discovered by Vick, and was complete before the cross-bill was filed. We hold that the statute did not begin to run in favor of Mottley until the loss or defalcation of

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the \$29,143.15 was disclosed to the stockholders, and discovered by them in 1890, after Mottley's death.

The fraud practiced on the new bank was in the concealment of the liability and true condition of the old bank to the extent of the \$29,143.15.

The fraudulent concealment by Vick and Mottley of the condition of the accounts of the old bank, done by agreement between them, prevented actual notice, and took the case out of the rule of constructive notice to the other directors. 5 Pickle, 643.

A cashier is bound to exercise reasonable skill, care, and diligence in the discharge of his duties; if he fails in such skill, or omits such care, and the bank suffers damage as a consequence, he is liable. 5 Pickle, 643.

The record abundantly shows that it was through the want of the exercise of reasonable skill, care, and diligence in the discharge of the duties imposed upon Cashier Mottley, and his failure to properly discharge his duties as such, that the bank was damaged and suffered the loss of the \$29,143.15, and he should be held liable for same. It is insisted that Mottley, if guilty of occasioning this loss, is guilty of a tort, and only liable for a tort, and, as he is dead, the tort died with him, and that there can be no recovery had against him. The tort may be waived, and action for value maintained against the wrong-doer or his representative.

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It is assigned as error that Mottley's estate was charged with being liable for the loans made by him, as cashier, to meet four notes of Waters & Co., aggregating \$11,362.79; also various notes on Anderson & Co.; also with the Wood note for \$1,000. These loans were made by Mottley to insolvent parties, without security, thereby entailing a loss to the bank. It was through want of care and diligence and reasonable skill upon the part of the cashier, Mottley, that the loans were made and the loss sustained. The Chancellor confirmed the finding of the Master upon these claims, and their findings will not be disturbed. 1 Pickle, 218, 251.

The decree of the Chancellor was erroneous in refusing to decree in favor of the trustees, Sanders and McKenzie, cross-complainants, holding the estate of Mottley liable for the said sum of \$29,143.15, and the decree as to that is reversed, and decree will be entered for the \$29,143.15, with interest from the date and time when the new bank was organized in 1886.

With this modification the decree will in all other respects be affirmed. The costs of this appeal will be paid by Complainant Vance, as administrator of Mottley.

Judge Caldwell, by reason of relationship to some of the parties, did not sit upon the hearing of the cause.

State *v.* Runnels.

92	820
110	608
•110	614
110	617

STATE *v.* RUNNELS.

(Nashville. March 4, 1893.)

1. CONSTITUTIONAL LAW. *Recitals in amendatory statutes.*

The Constitution requires that amendatory statutes "shall recite in their caption or otherwise the title or substance" of the law amended. A statute amendatory of the Code was entitled "An Act to amend § 4652, Subsection 16, of the Code of Tennessee," and contained in its body substantially the same description of the law amended. This statute contained no reference to the substance of the law amended.

Held: The amended law is sufficiently recited in both the caption and body of the amendatory Act.

Constitution construed: Art. II., § 17.

Act construed: Acts 1889, Ch. 161.

Cases cited: Ransome *v.* State, 91 Tenn., 718; Burnett *v.* Turner, 87 Tenn., 127.

2. CODE OF TENNESSEE.

The compilation of 1858 is entitled "An Act to revise the statutes of the State of Tennessee." It is provided therein that this compilation "is to be designated as the 'Code of Tennessee.'" Hence either title may be used in the recital of an amendatory statute.

Code construed: § 41 (M. & V.); § 40 (T. & S.).

FROM DAVIDSON.

Appeal in error from Criminal Court of Davidson County. J. M. ANDERSON, Judge.

State *v.* Runnels.

Attorney-General PICKLE for State.

J. WASHINGTON MOORE for Runnels.

CALDWELL, J. Robert Runnels was indicted, under Chapter 161 of the Acts of 1889, for unlawfully and feloniously *entering upon the inclosed lands of O. F. Noel and removing from the stalks the ears of corn growing thereon and attached thereto*, for the purpose of depriving the true owner, O. F. Noel, thereof, and appropriating the same to his own use.

Demurrer was sustained and the indictment quashed, upon the ground of unconstitutionality of the Act. The State appealed in error.

The Act in question is as follows:

"AN ACT to amend §4652, Subsection 16, of the Code of Tennessee.

"SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee, That § 4652, and Subsection 16 thereof, of the Code of Tennessee be so amended as to read: 'That it is hereby declared to be a felony for any one to enter upon the inclosed lands of another and remove from the stalks the ears of corn growing thereon or attached thereto, for the purpose of depriving the owner thereof, and appropriating [the same] to his own use.'*

"SEC. 2. *Be it further enacted, That any person guilty of a violation of the provisions of the first section of this Act shall, upon conviction thereof, be confined in the penitentiary for a period of one*

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year, or in the county jail for any period less than one year, at the discretion of the jury trying the cause.

"*Sec. 3. Be it further enacted,* That nothing in this Act shall be so understood as to prevent any person having an interest in said corn from gathering the same to be stored or sold, or for individual use.

"*Sec. 4. Be it further enacted,* That this Act take effect from and after its passage, the public welfare requiring it."

The Act is impeached as being in violation of the third clause of Section 17, Article II., of the Constitution of the State. That clause is in these words: "All Acts which repeal, revive, or amend former laws shall recite in their caption or otherwise the title or substance of the law repealed, revived, or amended."

The claim of the demurrant and the opinion of the Honorable Criminal Judge were that the Act assailed *does not* recite, in its *caption* or *otherwise*, the *title* or *substance* of the law amended.

The word "caption," as used in the Constitution, is synonymous with "title," and the word "otherwise" refers to the *body* of the repealing, reviving, or amending Act.

The constitutional requirement, in case of amendment, is met, therefore, if the *title* or *substance* of the "former law" be recited either in the *caption* or in the *body* of the amendatory Act.

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The law amended by the Act under consideration is in the language following, namely:

"Sec. 4652. It is declared to be a misdemeanor * * * (16) to sever and carry from such land any grass, hay, corn, grain, fruit, or other vegetables or produce." Code of Tennessee.

"The substance" of this law is not recited either in the caption or in the body of the amendatory Act. Indeed, no idea of the amended law, not even of the subject treated, is to be gathered from any part, or the whole, of the amending Act.

Is "the title" of the law amended recited in the amendatory Act?

It has been seen already that the latter Act, both in its caption and in the first section, refers to the former law as "Section 4652, Subsection 16, of the Code of Tennessee." It makes no other reference to the former law. Hence, unless those references are to be taken as recitals of "the title" of the law amended, its title is not recited in the amendatory Act.

The "Code of Tennessee" is a well-known volume, containing the revised statute law of the State up to the time of its adoption in 1858. There is but one such book extant. It is made up of parts, chapters, articles, and sections, the latter being numbered consecutively from 1 to 5604, and some of them being divided into subsections, likewise consecutively numbered. This book was adopted by the Legislature as a whole, the title

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and the enacting clause of the Act of adoption being as follows:

"AN ACT to revise the statutes of the State of Tennessee.

"SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee, That the General Statutes of the State of Tennessee shall be as follows, to wit:*" * * * *

Confessedly the constitutional requirement would be complied with by a recital of that title and a given section and subsection of the book in the caption or body of an amendatory act. To illustrate: The following would be a constitutional caption for an amendatory act, viz.: "An Act to amend Section 4652, Subsection 16, of an Act, entitled 'An Act to revise the statutes of the State of Tennessee.'"

Now, let us go a step further. Section 40 of that revision provides: "This compilation of the laws of the State is to be designated as the 'Code of Tennessee.'" In that way, by competent authority—by the Legislature itself—another title was given to the revision or compilation. As a body of general statutes, it might thereafter be known either by the original title of the Act of adoption, namely, "An Act to revise the statutes of the State of Tennessee," or by the other title, "Code of Tennessee," preference being given to the latter. By the latter title the revision or compilation soon became the more generally and familiarly known; and it was so known and recognized universally

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at the time the present Constitution was framed and adopted.

Upon these considerations, we are of opinion that the words, "Code of Tennessee," constitute "the title" of the compilation adopted and enacted in 1858, and amended by the Act here in question, within the meaning of the constitutional provision being considered; and, consequently, that such amendatory Act is not violative of that provision, but in compliance with it. That Act *does recite* in its caption *and* otherwise the legal title of the law amended.

This question, as relating to other Acts, was reserved *expressly* in *Ransome v. State*, 91 Tenn., 718, and *inferentially* in *Burnett v. Turner*, 87 Tenn., 127.

It is well to note a typographical error in § 5403 of the compilation of statutes by Milliken and Vertrees, which section purports to be a reproduction of § 4652 of the Code of Tennessee. In said § 5403, Subsection 15 of said § 4652, appears twice—first as Subsection 11, and then again as Subsection 16, the numbers of the intervening subsections being changed accordingly—and Subsection 16 of said § 4652, which is the subsection amended by the Act of 1889, here involved, is omitted altogether from said § 5403.

Reverse and remand.

Express Company *v.* Jackson.

EXPRESS COMPANY *v.* JACKSON.

(Nashville. March 4, 1893.)

1. COMMON CARRIER. *Liability for injury to live-stock.*

Suit for injuries sustained by live-stock during shipment. Prior to May 31, 1889, the express company contracted with Jackson to make shipment of thorough-bred horses from Belle Meade, Tenn., to Hunt's Point, N. Y., where they were to be sold on June 17, 1889. This shipment was to be made in safe and suitable cars, by fast train, in charge of company's agent, and to arrive at destination some days before the sale. The Johnstown flood occurred on May 31, 1889, breaking the company's ordinary line for eastern transportation. This was known to both parties when, on June 6, 1889, the company received the horses and began their shipment. The company selected one of several available lines as a substitute for the broken line, and the proof tends to show that it did not select the best one. The proof also tends to show that the company did not take the precaution to secure transportation in advance. Upon the substitute line selected the cars containing the horses were hitched to a coaling train that conveyed them only seventy-two miles in twelve hours, during which the horses, abandoned by the company's agent, were subjected to such treatment as resulted in serious injury.

Held: The express company is liable for the injuries sustained by the horses. The act of God—the Johnstown flood—was not the proximate cause of the injury. It occurred before the shipment began, and was then fully known to the company. The subcarrier's negligence was imputable to the express company, its principal.

2. SAME. *Express company is.*

Doctrine re-affirmed that an express company is a common carrier, and subject to all the duties and responsibilities attaching to that character.

Cases cited and approved: Railroad *v.* Wynn, 88 Tenn., 320; Transportation Co. *v.* Bloch Bros., 86 Tenn., 392; Baker *v.* Railroad, 10 Lea, 304; Railroad *v.* Jackson, 6 Heis., 271; Railroad *v.* Hale, 85 Tenn., 69; Smitha *v.* Railroad, 86 Tenn., 198; Railroad *v.* Mason, 11 Lea, 116; 112 U. S., 331; 71 Wis., 372; 1 Am. St. Rep., 721; 5 Am. St. Rep., 226.

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3. SAME. *Act of God.*

The act of God which will excuse a common carrier from liability, must be the proximate, not merely the remote, cause of the loss or injury. Hence the Johnstown flood, having occurred and being known before the shipment was undertaken, could not excuse the carrier from liability for loss occurring in the course of transportation, voluntarily undertaken with full knowledge of the situation. It, perhaps, might have justified the company in refusing to undertake the shipment.

Cases cited and approved: Railroad *v.* Wynn, 88 Tenn., 320; Transportation Co. *v.* Bloch Bros., 86 Tenn., 392; 27 Conn., 607; 54 N. Y., 504; 4 Zab. (N. J.), 697; 1 Murphy (N. C.), 173; 10 Wall., 176.

4. SAME. *Subcarriers are agents of carrier, not of the shipper.*

Doctrine re-affirmed that subcarriers are agents of the carrier, and not agents of the shipper, in the absence of special contract.

Case cited and approved: Transportation Co. *v.* Bloch Bros., 86 Tenn., 392.

FROM DAVIDSON.

Appeal from Circuit Court of Davidson County.
W. K. McALISTER, J.

BAXTER, HUTCHESON & BAXTER and BAXTER SMITH
for Express Company.

E. H. EAST and STEGER, WASHINGTON & JACKSON
for Jackson.

WILKES, J. The Adams Express Company was sued as a common carrier for damages alleged to have been sustained on a shipment of thorough-

Express Company *v.* Jackson.

bred horses from Nashville, Tennessee, to Hunt's Point, New York.

The declaration contained two counts—one for alleged breach of a special contract, and the other for the breach of the common law duty of the express company as a common carrier.

The company pleaded the general issue, not guilty. There was verdict and judgment against the company for \$8,000, from which it appealed.

The shipment was made from Belle Meade June 6, 1889. The horses were to be exposed to public sale at Hunt's Point by Wm. Easton, on June 17, 1889, and notice of the sale had been extensively given by advertisement all over the United States.

Much correspondence was had between the company and Gen. W. H. Jackson for several months before the shipment, the object of the shippers being to have the horses transported in properly constructed cars, with good ventilation, at a high rate of speed, to avoid long confinement, and in time to reach their destination for several days before the sale, in order that they might rest and recuperate.

The plaintiffs insist that they had a special contract with the company to furnish four red baggage-cars, such as were used by the Pennsylvania Railroad Company, which were well ventilated and suited for the transportation of live-stock; that the horses were to be carried at express rates of speed, so that the time consumed

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would not exceed forty-eight hours; that the train should be run as a *special*, and in charge of an agent of the company the entire route.

They allege that only one red baggage-car was run, and the others were poorly ventilated; that the time consumed was eighty-six hours; that at Pittsburg, Pa., they were abandoned by the agents of the company, and were attached to a coaling-train, and carried seventy-two miles behind it in twelve hours; and that the horses were badly injured and frightened by backing, switching, jamming, and being thrown down in the cars.

They also insist that, in the absence of any special contract, the company was legally bound as a common carrier, and breached its duty by failing to transport the horses in a reasonable time, to furnish suitable cars, to provide a route-agent, and by allowing the horse-cars to be attached to a coaling-train on a portion of the route, in consequence of which the horses were injured by the backing, switching, and jamming of such a train.

It was originally intended that the stock should be shipped on the fourth or fifth of June, and that they would go from Cincinnati to New York over the Pennsylvania Central Railroad, over which line the express company carried its shipments. On May 31, 1889, however, an unprecedented flood occurred at Johnstown, Pa., on this line of road, about seventy miles east of Pittsburg, which completely washed away several miles of the road, and stopped all passage over the same for several days.

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This fact was well known, both to the company and the shippers, several days before the shipment was made. The company, however, received the stock about three o'clock on the evening of June 6, 1889, reached Cincinnati with them at seven o'clock the next morning, and Pittsburg at seven o'clock in the evening thereafter. Up to this point every thing went well. The horses were carried safely, and at a high rate of speed, and in care of an agent. This was something over half-way to New York, but, the break in the road at Johnstown not having been repaired, the horses could be carried no farther over the Pennsylvania road, nor did the Adams company have any route open to New York from that point. The express company thereupon delivered the horses to Wells-Fargo & Co. Express, to be carried over the Pittsburg and Western Railroad to Leavittsburg, on the N. P. & O. R. R., thence to Elmira, N. Y., where the Adams company would again take them in charge and carry them over the Lehigh Valley Road to New York.

The horses were delivered to the Wells-Fargo & Co. Express at night, at or near Pittsburg, and by it were carried, over the Pittsburg and Western Railroad, to Leavittsburg, attached to a coaling-train, a distance of seventy-two miles, consuming twelve hours in the transit. The testimony is that between these two points there was much switching, jerking, and bumping of cars, noise and smoke from passing engines, and that in conse-

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quence the horses took fright, reared, plunged, and became unmanageable, and many of them were thrown down, crippled, bruised, and roughly treated.

The real controversy in the case narrowed down to and turned upon the liability of the company for the physical injuries to the horses, nearly, if not quite, all of which were sustained between these points.

The express company claims that it did the best it could under the circumstances; that it could not carry the horses farther over the line usually used by it; that it had a right to select another route, and tranship the horses to another company; that, before shipping the horses, it had notified the shippers of all the facts, and requested them to delay shipment for a few days until their regular line was opened, which they declined to do; and that when it delivered the horses to the Wells-Fargo Company, that company, under the circumstances, became the agent of the shippers, and not of the Adams Express Company.

The shippers, however, insist that they could not delay shipment, as their sale had already been advertised for a certain date; that they did not assume to dictate what route or means the express company should adopt to reach New York; that they had nothing to do with the Wells-Fargo & Co. Express, and did not even know that any other company was to carry the stock, no matter what route might be selected; that the Adams company

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undertook to carry the stock safely to New York, and were bound, both under their special contract and under their common law liabilities as common carriers, to carry them to destination; and if it employed another company over any part of the route, such company would be the agent of Adams company, and not of the shippers.

Many errors are assigned to the charge of the Court below, but the controversy turns mainly upon one or two questions, the decision of which disposes of all the exceptions. The express company, after the interruption of their route by the floods, could have declined altogether to make the shipment, on the ground that the act of God had prevented it from safely and properly complying with its contract, as a common carrier, to transport the horses. Under the facts, this might have been a good defense. Having undertaken, however, to take the shipment, with the knowledge of the facts, the full extent of its liability as a common carrier attached, and it cannot set up as a defense the plea of a sudden emergency which would absolve it from liability under the facts of this case.

An express company is a common carrier, and, as such, is subject to all the duties and responsibilities of common carriers at common law. *Railway Co. v. Wynn*, 4 Pickle, 320; *Transportation Co. v. Bloch Bros.*, 2 Pickle, 392; *Baker v. Railroad Co.*, 10 Lea, 304; *Railroad Co. v. Jackson*, 6 Heis., 271; *Railroad Co. v. Hale*, 1 Pickle, 69; *Smith v. Railroad Co.*, 2 Pickle, 198; *Railroad Co.*

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v. *Mason*, 11 Lea, 116; *Hart v. Railroad Co.*, 112 U. S., 331; *Ayers v. Railroad Co.*, 71 Wis., 372; 5 Am. St. Rep., 226; 1 Am. St. Rep., 721.

Such company can only be excused by the act of God or the public enemy, or in a shipment of live-stock, where the injuries result from the inherent nature, propensities, or habits of the animals themselves. *Railroad Co. v. Wynn*, 4 Pickle, 320; *Transportation Co. v. Bloch Bros.*, 2 Pickle, 392; *Converse v. Brainerd*, 27 Conn., 607; *Condict v. Railroad Co.*, 54 N. Y., 504.

Where the act of God is invoked as a defense, it must be the proximate cause of the injury. If the act of a third party, or of the carrier or its agents, is the proximate cause, but the act of God is the remote cause, it is not available as a defense. *New Brunswick Steam-boat Co. v. Tiers et al.*, 4 Zab. (N. J.), 697; *Backhouse v. Sneed*, 1 Murphy (N. C.), 173; *Railroad Co. v. Reeves*, 10 Wall. (U. S.), 176; *Converse v. Brainerd*, 27 Conn., 607.

The subcarriers employed by an express company are its agents, and not the agents of the shippers, unless so expressly stipulated. *Transportation Co. v. Bloch Bros.*, 2 Pickle, 392.

If the company found it necessary to hand over the horses to another company, it had the legal right to do so; but it did not thereby relieve itself from liability to the shipper, unless it was so expressly stipulated between the shipper and company.

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There is evidence in this case that the company could have transshipped these horses at Cincinnati over other express lines, such as the United States, the American, the Baltimore & Ohio, all of which had routes to New York over lines of railroad which had ample facilities for safe and rapid transportation, but it declined to do so in order to obtain the longer haul over its own route to Pittsburg, where it was under the necessity of sending the horses over an inferior line of railroad, with limited accommodations and facilities for rapid and safe transit, and, at that time, congested with unusual business, caused by the recent floods. It is also shown that the company did not exercise that diligence in procuring beforehand transportation over the route selected, and it was only when the horses had reached or were nearing Pittsburg that any application was made to the superintendent of the Pittsburg and Western Road for special arrangements for this particular shipment—too late for them to be procured, if, indeed, they could have been furnished at all.

There is sufficient evidence as to the injury done to the horses, and the damage sustained in consequence, and the verdict of the jury is sustained by the evidence as to the amount of damages.

The judgment of the Court below will be affirmed, with costs.

Nashville *v.* Sutherland & Co.

*NASHVILLE *v.* SUTHERLAND & CO.

(*Nashville.* March 4, 1893.)

MUNICIPAL CORPORATIONS. *Ultra vires contract.*

A contract on the part of a city, made by accepting a deed of a right of way for a sewer pipe, to the effect that the city will have the sewer so constructed with a suitable valve as to prevent water from flowing back into the grantor's premises, is, in the absence of express charter power to make such a contract, valid only so far as the city would have been bound by law in the absence of any contract—that is, for negligence in the execution of the work—but so far as it assumes to insure or guarantee the grantor against other damage, it is void.

Cases cited and approved: Humes *v.* Knoxville, 1 Hum., 403; Nashville *v.* Brown, 9 Heis., 6; Horton *v.* Nashville, 4 Lea, 49; 4 Am. & Eng. Corp. Cas., 339, 341; 18 Am. St. Rep., 377; 2 Am. & Eng. Corp. Cas., 640; 12 Wall., 349.

FROM DAVIDSON.

Appeal in error from Circuit Court of Davidson County. W. K. McALISTER, J.

J. M. ANDERSON for Nashville.

WHITMAN & GAMBLE for Sutherland.

SNODGRASS, J. The defendant in error, by joint conveyance of its members, Wm. Sutherland and

*There is a note to the above case reported in 19 L. R. A., 619, on the limitation of the doctrine of *ultra vires* in respect to municipal corporations.—REPORTER.

Nashville v. Sutherland & Co.

Chas. A. Graves, in deed executed June 15, 1888, conveyed to plaintiff in error a right of way through their lumber-yard for a sewer-pipe, to drain into the river a pond lying near the property of Sutherland & Co., for the consideration of \$150, and the further consideration expressed in a clause of the deed made by Sutherland and Graves, to be hereinafter quoted, which deed was accepted by the city, the cash consideration paid, and the pipe laid and a valve constructed.

The terms of the contract were expressed in the deed referred to; and while this was signed only by the vendors, it, as stated, was accepted by the city, and is therefore as obligatory as if signed by its authorized officers, to the extent that it is at all binding.

The clause of the contract out of which the present controversy arises is as follows:

"It is further agreed, and the city of Nashville binds itself, to have said sewer so constructed with a suitable valve as will prevent, in case of high rise in the river, the flowing of water from the river back through the said pipe or sewer into the lot or premises of said Sutherland and Graves to their injury or damage."

And its effect, if valid, is to make the city an insurer of the property of the conveyors against injury or damage by reason of overflow through this valve and pipe.

The city laid the pipe and constructed the valve in the fall of 1888. In 1890 an unusually high

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rise in the river caused an overflow through the valve and pipe, and submerged the property of Sutherland & Co., doing them much damage. The present action was instituted by them to recover damages arising from breach of this contract. The amount claimed was \$3,000. There was a verdict for \$2,845, \$845 of which was remitted, and judgment rendered for \$2,000 and costs. The city appealed in error.

The Court charged the jury "that if the Board of Public Works and Affairs accepted for the city this contract, and in pursuance of it entered upon the plaintiff's premises, and occupied the same by the construction of said sewer or drain, then the city will be bound by all the covenants and stipulations of the contract."

He refused to charge, as requested by plaintiff in error, that "the city is only liable for such negligence as is imposed by law, and the officers of the city cannot bind it to a higher degree of care and skill and diligence than the law imposes. Before the city can be bound by guarantee of its officers, they must have the power, under the charter of the city, to bind the city by such guarantee."

In both respects, his Honor, the Circuit Judge, was in error. It was within the power of the officers of the city to agree to put in any given kind of sewer and valve (had they done so) as part consideration for the grant of right of way; but they could not, in the absence of charter

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power, bind the city by a guarantee that they or it would put in such pipe or valve as would prevent overflow to the injury or damage of defendants, and thus make the city insurers of property against such injury.

The city is only liable for absence of reasonable care and skill in the execution of such work, and its officers cannot lawfully contract to bind it beyond this without express charter power not claimed or shown in this record to exist.

The first proposition is well settled everywhere, and specially in this State. *Humes v. Knoxville*, 1 Hum., 403; *Nashville v. Brown*, 9 Heis., 6; *Horton v. Nashville*, 4 Lea, 49. And the second follows as a matter of course. But this, while not heretofore, as far as we are able to find, expressly adjudged in this State, has been elsewhere settled, and the principle is a sound one.

The theory on which it is founded is thus stated by Mr. Dillon:

"In determining *the extent of the power* of a municipal corporation to make contracts, and in ascertaining *the mode* in which the power is to be exercised, the importance of a careful study of the charter or incorporating Act and of the general legislation of the State on the subject, if there be any, cannot be too strongly urged. Where there are express provisions on the subject, these will, of course, measure, as far as they extend, the authority of the corporation. The power to make contracts, and to sue and to be sued thereon,

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is usually conferred in general terms in the incorporating Act. But where the power is conferred in this manner, it is not to be construed as authorizing the making of contracts of all descriptions, but only such as are necessary and usual, fit and proper, to enable the corporation to secure or to carry into effect the purposes for which it was created; and the extent of the power will depend upon the other provisions of the charter prescribing the matters in respect of which the corporation is authorized to act. To the extent necessary to execute the special powers and functions with which it is endowed by its charter, there is, indeed, an *implied or incidental authority* to contract obligations, and to sue and be sued in the corporate name." Dillon on Municipal Corp., Sec. 443.

As to the effect of *ultra vires* contracts, the same author adds:

"The general principle of law is settled beyond controversy that the agents, officers, or even city council of a municipal corporation *cannot bind the corporation* by any contract which is *beyond the scope of its powers*, or entirely *foreign* to the purposes of the corporation, or which (not being legislatively authorized) is against public policy. This doctrine grows out of the nature of such institutions, and rests upon reasonable and solid grounds. The inhabitants are the corporators; the officers are but officers or public agents of the corporation. The duties and powers of the officers or

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public agents of the corporation are prescribed by statute or charter, which all persons not only may know, but are bound to know. The opposite doctrine would be fraught with such danger and accompanied with such abuse that it would soon end in the ruin of municipalities or be legislatively overthrown. These considerations vindicate both the reasonableness and necessity of the rule that the corporation is bound only when its agents or officers—by whom it can alone act, if it acts at all—keep within the limits of the chartered authority of the corporation. The history of the workings of municipal bodies has demonstrated the salutary nature of this principle, and that it is the part of true wisdom to keep the corporate wings clipped down to the lawful standard. It results from this doctrine that contracts not authorized by the charter or by other legislative acts—that is, not within the scope of the powers of the corporation under any circumstances—are void; and, in actions thereon, the corporations may successfully interpose the plea of *ultra vires*, setting up as a defense its own want of power, under its charter or constituent statute, to enter into the contract." Dillon on Municipal Corp., Sec. 457.

In Sec. 458 of same work he says:

"Agreeably to the foregoing principles, a corporation cannot maintain an *action on a bond or a contract which is invalid*; as, where a city, without authority, loaned its bonds to a private company, and took from it a penal bond, conditioned for

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the faithful application of the city bonds to payment for works which the city had no power to construct or assist in constructing. The remedy in such case must be in some other form than in an action to enforce the contract. So, a contract by a city to waive its rights to go on with the laying out of a street or not, as it might choose, is, it seems, against *public policy*; and it is void if it amounts to a surrender of its legislative discretion." Dillon on Municipal Corporations, Sec. 458.

See, also, case of *Vanhorn v. Des Moines*, 4 Am. and Eng. C. C., 339. This is an Iowa case. It was a suit brought by the owner of a certain building, that had been destroyed by fire, against the city of Des Moines, predicated upon the neglect of Des Moines Water-works Company to supply sufficient water to extinguish the fire. It appeared in this case that the water-works company was a private corporation, with which the city of Des Moines had contracted to furnish its fire department a certain quantity of water, and said water company further indemnified the city against all damages that might result to it by reason of the water company's negligence in the construction and operation of its works.

The Court, after discussing the general liabilities of a municipal corporation for its failure to extinguish fires, and determining that there was no such liability, proceeded to consider the case with reference to the contract between the city

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and the water-works, and on this branch of the case said :

"But it is said that the case at bar is peculiar, in this, that the city took a contract from the water-works company to protect itself against all actions that might be brought against it for misfeasance or neglect on the part of the company. This indemnity, it is claimed, gives a right of action where otherwise it would not exist; but clearly this is not so. Indemnification against liability must always be regarded as having reference to existing grounds of liability, and not as serving to create new ones. Besides, the city could not assume liability for negligence in cases where the law did not already impose a liability. The contract, then, must be construed as covering cases only where an action might be maintained against the city independent of the contract." 4 Am. & Eng. C. C., 341.

In *Becker v. Keokuk Water-works*, 18 Am. St. Rep., 377, the Vanhorn case is cited and approved; and in that case it was held that a city could not assume a liability for negligence where none was imposed by law, and that the contract of indemnity must be regarded as having reference to existing grounds of liability, and not as creating new ones. 18 Am. St. Rep., 379.

Another case, involving same principle, is *Black v. City of Columbia*, 19 S. C. Rep.; 2 Am. & Eng. C. C., 640. This was a suit to recover damages plaintiff had sustained in loss of his house

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by fire. It was claimed by plaintiff, among other things, that the fire was the result of the defendant's negligence in failing to furnish a sufficient supply of water, as it had *contracted* and *agreed* to do. The Court said:

"If, however, we consider that there was, as alleged, a distinct, express contract of the officers with the plaintiff, personally undertaking to insure him an adequate supply of water in the pipes at all times for the purposes aforesaid, it does not necessarily follow that the action could be maintained upon such contract. That would involve another question—whether the officers of the corporation have the right to make such a contract. Doubtless there are cases in which a contract by a municipal corporation will be implied from facts. These, however, arise, for the most part, out of transactions in which the corporation itself has in some way received and used property or money which, *ex aequo et bono*, does not belong to it. But in all cases, either of express or implied contract on the part of the corporation, the contract cannot be enforced against the corporation if it is in violation of the charter or beyond the scope of the agency created by it. In such case, the principle of *respondeat superior* does not apply, but the alleged contract is *ultra vires* and void. To this class belongs an alleged contract which restricts the exercise of legislative discretion vested in the municipality or its officers in reference to public duties, and, upon such contract, the corpo-

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ration cannot be held either in special or general *assumpsit*. *Thomas v. City of Richmond*, 12 Wall., 349; Dill. Mun. Corp., Secs. 61, 372, and notes. In the case from Wallace, notes were issued by the city of Richmond to circulate as money, in contravention of law, and it was held that they could not be recovered. The Court said: 'Municipal corporations represent the public, and are themselves to be protected against the unauthorized acts of their officers when it can be done without injury to third parties. Persons dealing with such officers are chargeable with notice of the powers which the corporation possesses, and are to be held responsible accordingly. The issuing of bills by such a corporation, without authority, is not only contrary to positive law, but, being *ultra vires*, is an abuse of the public franchise which has been conferred upon it, and the receiver of the bills, being chargeable with notice, is in *pari delicto* with the officers, and should have no remedy against the corporation. * * * The protection of public corporations from such unauthorized acts of their officers, is a matter of public policy in which the whole community is concerned,' etc. If, as alleged, there was, in this case, a contract by the officers of the city, insuring to the plaintiff an adequate supply of water at all times and under all circumstances, we are inclined to the opinion that it was a contract restricting the discretion of the municipality beyond the scope of the charter, and, if actually proved, would not support an action against

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the corporation." 2 Am. & Eng. C. C., pages 647 and 648.

We add to this case, concluding the citation of authorities on the point in issue, the admirable comment in argument of counsel for the city, which concisely and accurately expresses the view of the Court:

"As, in this case, it was held as the law itself imposed no liability on the defendant city for its failure to supply plaintiff with water, no contract that its officers might make could charge it with such liability; so, in the case at bar, it should be held that, as the law binds the defendant only to a careful and skillful exercise of the construction of its sewers, and does not impose on them the obligation and liability of an insurer, no contract that its officers might make could impose such liability.

"That a municipal corporation cannot and should not be bound by an *ultra vires* contract is a proposition that is well settled by authority and sustained by reason and justice. To hold otherwise would be to vastly enlarge the authority of public agents, and permit them to bind a municipal corporation by contracts absolutely prohibited by law, and would thus expose the public to evils and abuses that the limitations and restrictions thrown around corporate officers are intended to prevent. On the other hand, there is no hardship in such a doctrine, for these officers are public officers, whose

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rights and powers are fixed by law, and he who is ignorant of them is ignorant without excuse."

The Board of Public Works and Affairs could bind the city by contract so far and no further than it would have been bound by law, that is to ordinary skill and care in the execution of the work agreed to be done. So, as is well said in the same argument of counsel:

"If they had undertaken to indemnify Sutherland & Co. against loss resulting from defendant's negligence in the execution of the work, this would have been valid, for this much the city is bound by law, independent of any contract provision; but, instead of limiting the city's obligation as fixed by law, the Board, by contract, attempted to make it liable for what, in the absence of such a contract, it is not pretended it could have been held liable.

"The inhabitants of the city of Nashville—those people who live within the corporate limits—are its corporators. Their liability as well as their rights are fixed by law, and no more can the agents of these corporators increase their liabilities than they can deprive them of their rights.

"The Legislature of the State has deemed it a wise policy to charge municipal corporations with a certain liability. All who deal with these corporations are bound to know the extent of this liability; and when the corporation's agents exceed it, they may be guilty of a personal wrong, but

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cannot subject the corporation they represent to damages on that account."

For the errors indicated, the judgment must be reversed, and the case remanded for a new trial. Defendants in error will pay costs of this Court.

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(Nashville. March 4, 1893.)

1. EJECTMENT. *Plaintiff's title.*

In ejectment, the plaintiff must recover upon the strength of his own title. The weakness of his adversary's title will not avail. Outstanding title in third person will defeat plaintiff's recovery. (*Post*, pp. 350, 351.)

2. EXECUTION SALE. *Only legal titles subject to.*

Only legal titles are subject to execution levy and sale. (*Post*, p. 355.) Cases cited and approved: Springer *v.* Smith, 3 Lea, 737; Henderson *v.* Hill, 9 Lea, 25; Smith *v.* Taylor, 11 Lea, 738.

3. HOLDER OF LEGAL TITLE. *His equities.*

The holder of the legal title to land can retain it against the party otherwise entitled to demand it, until the latter has paid all debts due from him to such holder on any account whatever. (*Post*, pp. 358, 359.)

Cases cited and approved: Williams *v.* Love, 2 Head, 84; White *v.* Blakemore, 8 Lea, 62.

4. PURCHASER AT EXECUTION SALE. *Caveat emptor applies.*

Caveat emptor applies with full force to purchaser at execution sale. Such purchaser must abide by the title of the execution debtor. He occupies no higher ground than the debtor himself. (*Post*, pp. 360, 361.)

Cases cited and approved: Click *v.* Click, 1 Heis., 607; Henderson *v.* Overton, 2 Yer., 396; Bumpas *v.* Gregory, 8 Yer., 58; Arendale *v.* Morgan, 5 Sneed, 705; Berry *v.* Walden, 4 Hay., 179; Simmons *v.* Tillery, 1 Tenn., 275; Brown *v.* Bigley, 3 Tenn. Ch., 629.

5. EQUITABLE ESTOPPEL. *Not applicable.*

The facts of this case, fully set out in the opinion, will not justify the

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application of the doctrine of equitable estoppel in complainant's favor.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
ANDREW ALLISON, Ch.

**VERTREES & VERTREES, LYTTON TAYLOR, and
STEGER, WASHINGTON & JACKSON** for Evans.

J. C. BRADFORD and BAXTER & HUTCHESON for
Land Co.

LURTON, C. J. This is a bill of ejectment. The lot in controversy is known as No. 64 in the O. B. Hayes plan of lots. The bill is filed for the purpose of canceling certain deeds affecting complainant's claim of title, and to recover possession, the lot being adversely held by the defendant. The title of complainant rests upon a judgment in favor of W. H. Evans, the husband of complainant, against Henry M. Hayes, and a levy and Sheriff's sale of the lot as the property of said Hayes. The lot was bid in by the execution creditor, who afterward assigned his bid to his wife, in consideration of an alleged debt to the wife. The execution sale occurred May 10, 1873, and in August, 1875, the Sheriff made deed to

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Mr. Evans, the complainant. The judgment, levy, sale, and Sheriff's deed are regular, and no question is made as to them. The lot was unoccupied at time of levy and sale; but in 1883 it was inclosed by Mrs. Adelicia Cheatham, under whom the defendant company holds. It remained in her adverse possession until her sale to the Belmont Land Company, and, since that sale, has been in the adverse possession of her vendee. As Mrs. Evans has all the time been a married woman, the statute of limitations has not barred her suit. The legal title to this lot was not in Henry M. Hayes at the time of the levy or sale, but was outstanding in the heirs of John T. Edgar. These heirs were under legal disabilities, and the adverse possession of neither the defendant or its vendor has operated to divest that title or bar the remedy to recover possession. That title, pending this suit, has been acquired by the defendant company. This statement as to the title of the execution debtor would ordinarily be conclusive against complainant's suit as a mere ejectment bill. The cause must, however, turn upon the effect of certain other facts yet to be stated, which, it is insisted, operate as an estoppel upon the defendant company to dispute the existence of a good and sufficient legal title in Henry M. Hayes at the time of the levy and sale of this lot as his property. This claim of estoppel rests upon the following state of facts:

Mr. O. B. Hayes, the father of Henry M.

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Hayes—under whom complainant claims—and of Mrs. Adelicia Cheatham—under whom the defendant holds—died testate, leaving by his will a large parcel of land, adjoining the property owned and occupied by Mrs. Cheatham, and known as “Belmont,” to five of his children, as tenants in common. Henry M. Hayes was one of these devisees. Mrs. Cheatham had, by marriage, acquired a large fortune, and hence consented that her father’s estate should be devised to her five brothers and sisters. She therefore had no interest in the lands so devised.

Sometime in 1865 the five Hayes devisees became desirous of partitioning this O. B. Hayes land among themselves. A strip of this land, containing about four and eight-tenths acres, was so situated with reference to “Belmont” that Mrs. Cheatham desired it, and it was accordingly agreed that if they would convey to her this strip, she would let them have, and permit them to include in the proposed partition, a piece containing five and three-fourths acres, adjoining both Belmont and the O. B. Hayes land, and known as the “Edgar” lot. This agreement is stated in the answer of the Belmont company in these words:

“In the improvement of the Belmont property *she needed* a piece of about four and eight-tenths ($4\frac{8}{10}$) acres, which belonged to her father’s estate, and she orally agreed with her father’s devisees that if they would convey to her said piece of four and eight-tenths ($4\frac{8}{10}$) acres of land, she

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would allow said Edgar land to be partitioned among said devisees *as though it were a part of the estate of her father*, said O. B. Hayes. * * *

"When the lands of the said O. B. Hayes were partitioned among his devisees, the said Edgar land was also partitioned, and was *designated in the plan of said partition as lots 63 and 64*. Lot 63 was assigned to Mrs. Corinne Lawrence, who was a sister of the said Mrs. Acklen, or Cheatham."

The lands owned by the Hayes heirs, and the "Edgar" parcel, which they got from Mrs. Cheatham by the exchange, were all partitioned as one body. They were divided into seventy-one lots, with convenient streets. A plot or plan of these lots and streets was made November 9, 1865, and registered in book 21, page 87, of the Register's office. By the deed of partition these streets were made public streets. The lots were numbered from one to seventy-one, inclusive. Two of the heirs got fourteen and one-half lots each, and three of them got fourteen lots each.

As stated in the answer, this Edgar lot was partitioned *as if part of the O. B. Hayes land*, and became lots 63 and 64 in the plan of division. Under the partition agreement between the Hayes heirs, made in 1866 and duly registered, lot 63 was assigned to Mrs. Lawrence, and lot 64, the one in dispute, to Henry M. Hayes.

This agreement for an exchange was in parol, and no step was taken to carry it out until September 23, 1876, three years after the sale under

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execution of lot 64, when four of the five Hayes devisees, including Henry Hayes, joined in a *quitclaim* deed to Mrs. Cheatham, conveying to her their interests in the strip she was to receive in exchange for the Edgar lot. This deed contains the following recitals:

"Whereas, in the division of the property of O. B. Hayes, deceased, certain real estate belonging to Mrs. Adelicia Cheatham was *considered part thereof*, and the same fell to the share of W. L. B. Lawrence and wife, Corinne, and Henry M. Hayes, and was known as the *property bought* by said Adelicia Cheatham, formerly Acklen, of Dr. Edgar, and in consideration said Adelicia would convey said property to the heirs of O. B. Hayes, and *allow it to be divided as a part thereof*, said heirs were to quitclaim to her certain real estate herein described; now," etc.

Joel M. Hayes refused to join in this deed, and the title to his one undivided fifth is outstanding in his heirs. Mrs. Cheatham has never conveyed the Edgar lot to the Hayes heirs, or to Henry M. Hayes or Mrs. Lawrence, to whom, as lots 63 and 64, it fell in the partition. But an explanation is found for this in the fact that about the time she received the conveyance to the strip she derived from them, she also took *quitclaim* deeds from Mrs. Lawrence and H. M. Hayes for lots 63 and 64.

Mrs. Lawrence's deed is dated September 22, 1876, and recites that it is made in consideration

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and in part payment of a note due from her to Mrs. Cheatham, and dated July, 1871.

The deed from Henry M. Hayes is dated October 2, 1876, and recites that the consideration was a part payment of a note due Mrs. Cheatham, and dated March, 1870.

These quitclaim conveyances were evidently executed for the purpose of relieving Mrs. Cheatham from her oral agreement, and in consideration of the indebtedness then existing to her, which was, in fact, thus paid. But for the intervening levy on and sale of lot 64, no question whatever could remain concerning this executory agreement for an exchange of this Edgar land. These quitclaim conveyances were a complete release to Mrs. Cheatham, and her claim and ownership of these lots—the execution sale out of the way—could not be a matter of controversy as between herself and the Hayes heirs.

Was there any legal or equitable obstacle which prevented Mrs. Cheatham from acquiring the equitable interest of Henry M. Hayes in lot 64? Did he have any such title or interest at the date of levy as was the subject of levy at law?

It has been argued that the partition agreement between the Hayes devisees operated as a conveyance by each to the other. That would be true as to all the lands embraced in that partition deed held by the parties thereto under the will of O. B. Hayes as tenants in common. But the *title* to lot 64 was never in O. B. Hayes, or in the par-

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titioning devisees. The conveyance in partition could not, therefore, operate to vest in H. M. Hayes any greater title than was in the parties to the deed. At most, this partition deed amounted to mere color of title.

To admit that one holding under mere color of title has such a title as is subject to levy, would not advance the solution of this case. Complainant could not recover in ejectment upon a showing that she had acquired a *color of title*. She must show that she has a *perfect legal title*, and recover upon the strength of her title, and not upon the vices in the adversary title.

Whether the legal title to this lot was in the Edgar heirs or in Mrs. Cheatham, at the date of the levy, is a matter of little importance. *It was not in the execution debtor.* In this State, by uniform decisions extending through nearly a century, an execution can only be levied upon a legal title. *Springer v. Smith*, 3 Lea, 737; *Henderson v. Hill*, 9 Lea, 25; *Smith v. Taylor*, 11 Lea, 738.

In the reply brief to assignment of errors filed by appellant, counsel for Mrs. Evans tersely state their contention in these words:

"We admit that no deed or written conveyance was ever in fact executed by Mrs. Cheatham to H. M. Hayes, but her conduct with respect to this land was such as to *estop* her, and those claiming under her, and to validate the title of H. M. Hayes."

This contention proceeds upon the assumption

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that the legal title was in Mrs. Cheatham. We shall, for the present, treat the case as if this were true. The *conduct* of Mrs. Cheatham relied upon as an estoppel may be briefly stated as follows:

(1) She agreed to receive in exchange for the Edgar land a strip of the Hayes land, and that the Hayes devisees might partition the Edgar land as if it were part of the Hayes tract.

(2) That, under this agreement, the Edgar land was surveyed as if part of the Hayes land, and the two parcels subdivided into lots, and a plat showing this subdivision was placed upon record.

(3) That Henry M. Hayes and Mrs. Lawrence, to whom the Edgar land fell in the partition, gave up to the other Hayes devisees an equivalent in other lands of the testator for these lots, and that to permit Mrs. Cheatham to assert her title to the Edgar land would be to deprive them of the value of the land they had surrendered to their co-devisees as an equivalent in partition; that they were led to accept these lots in reliance upon her agreement, and that she should not be permitted to assert her title as against them.

(4) That she had subsequently recognized the partition made by the Hayes heirs, by buying, in 1870, lot No. 70 in that plot from O. B. Hayes, Jr., and taking deed reciting the plan of division. That she took a deed from H. M. Hayes, in 1870, to lot No. 71 under that plan, and took from him, the same year, a mortgage covering the remainder

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of the lots assigned to him under that partition, save lot 64 now in controversy.

Does all this conduct and recognition operate such an equitable estoppel upon Mrs. Cheatham as to prevent her from setting up her title as against Henry M. Hayes? Manifestly, if H. M. Hayes was now the complainant, it would be a conclusive answer that, after lot 64 had been assigned to him, he had, for a valuable consideration, quitclaimed by his deed of 1876. But complainant contends, and justly, that her rights must depend upon the status existing at the date of the levy in 1873, and that at that time Mrs. Cheatham would have been estopped to deny that he had obtained her title. Let us see just what were the equities then existing against and in favor of Mrs. Cheatham.

At that time no conveyance had been made to her of the strip she was to receive in exchange. If she was in equity bound to convey the Edgar land to the Hayes devisees, they were equally bound to convey to her the parcel she was to receive in exchange. H. M. Hayes, as the assignee of the Hayes devisees to lot 64, stood upon no higher ground than they stood, and she could not have been compelled to carry out the agreement of exchange unless it was mutually performed.

But it is said that thereafter, to wit, in 1876, *four* of the Hayes devisees, including Henry M. Hayes, did convey to her their interests in the strip she wished to add to Belmont. The acceptance of this conveyance, made in pursuance of the

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original agreement for an exchange, every thing else out of the way, was such performance as equitably entitled Henry M. Hayes to call for the legal title to the lot assigned him in partition. But there was another and distinct equity in favor of Mrs. Cheatham at the date of her acceptance of the title to her strip. This new and distinct equity was this: Henry M. Hayes was then heavily indebted to her. This indebtedness *probably* arose before lot 64 was set off to him; but it certainly existed in July, 1870.

If it be conceded that the acceptance, in 1876, by Mrs. Cheatham of the title to the strip she desired, inured to the perfection of the title of one claiming under a levy made three years before, then we are confronted with the question as to the effect of the other fact, the fact that at the date of that levy the execution debtor was heavily indebted to the holder of the legal title of the lot upon which the levy was made. This indebtedness was secured in part by a mortgage taken in 1870 upon all of the lots set off to Henry M. Hayes by the deed of partition, *except lot 64*. This exception is significant. Hayes had no possession of lot 64. He did not have the title. The agreement between the Hayes heirs and Mrs. Cheatham was still unexecuted on either side. We have already seen that non-performance by the Hayes heirs in equity relieved Mrs. Cheatham. For this reason, perhaps, lot No. 64 was not included in his mortgage. But for another reason its inclusion

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was unnecessary. She held the legal title, and could not be required to surrender or convey her title until this debt was paid. She was entitled to withhold the title as a security. It was immaterial to the assertion of this equity that the indebtedness arose from independent transactions wholly disconnected with the title which she withheld. *Williams v. Love*, 2 Head, 84; *White v. Blakemore*, 8 Lea, 62.

Stripping the case of all the consequences attributable to the fact that at the date of the levy on this lot the Hayes heirs had not carried out, or offered to carry out, their side of the agreement for an exchange, and treating the case as if Mrs. Cheatham had received title at the time the Edgar land was subdivided as if part of the Hayes land, we have this situation at the date of the levy in 1873 on this lot: Namely, that after this part of the Edgar lot fell to H. M. Hayes, and after he became entitled by reason of all that had gone before to call for the legal title, he became indebted to Mrs. Cheatham. At once there arose a new equity. She was entitled to withhold this legal title until this debt was paid. In this situation the lot is levied on and sold at execution sale.

Clearly, at the date of this levy, Mrs. Cheatham's equity was such that Hayes could not have compelled her to convey to him this lot, even though she had *then* received title to the strip she was to receive in exchange. So, holding the legal

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title, she would have been entitled, in a Court of Equity, to subject his equitable interest in this to the satisfaction of her debt. Recognizing this equitable right, H. M. Hayes, by *quitclaim* deed, and in part satisfaction of the debt, to secure which she was entitled to hold the legal title, conveyed or relinquished his equitable rights in this lot. As between himself and his creditor, he, by this relinquishment, did no more than a Court of Equity would have compelled him to do.

If we assume that H. M. Hayes had a *leviable* title by reason of the partition agreement purporting to convey title, and that the acquisition of this *leviable* title operated to give the purchaser the *equitable rights and interests* of the execution debtor, then what were those rights?

Clearly, a purchaser at execution sale stands in no higher situation than the execution debtor.

The Chancellor, in effect, treats the purchaser at an execution sale with as favorable consideration as is extended to an innocent purchaser for a valuable consideration without notice.

This Court, on the contrary, holds that a purchaser at a Sheriff's sale is *not* to be regarded as "a purchaser for a valuable consideration." *Click v. Click*, 1 Heis., 612.

"*Caveat emptor* is the undoubted rule in relation to titles in cases of execution sales of land." *Henderson v. Overton*, 2 Yer., 396; *Bumpas v. Gregory*, 8 Yer., 58.

"He buys at his peril, and occupies the attitude

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of a mere assignee by operation of law; nothing is taken in his favor, and he must stand upon strict law." *Arendale v. Morgan*, 6 Sneed, 715.

The purchaser at execution sale "must take precisely as the defendant held—subject to all equities that he was," etc. *Berry v. Walden*, 4 Hay., 179; *Simmons v. Tillery*, 1 Tenn., 268; *Brown & Reid v. Bigley*, 3 Tenn. Ch., 629.

Learned counsel for complainant have endeavored to avoid the inevitable result which must follow, by insisting that the rule that one having the legal title may retain it, as against the equitable owner, as a security, etc., does not apply to this case. In the printed brief this is said as an answer to this doctrine:

"The facts to which the appellant seeks to apply this doctrine may be stated thus: 'Mr. Hayes owed Mrs. Cheatham money; the legal title to lot No. 64 is in Mrs. Cheatham. Mrs. Cheatham never refused to convey on the ground that H. M. Hayes owed her. Nevertheless, the Belmont Land Company, as assignee of Mrs. Cheatham, can defeat this action of ejectment, unless Mr. Hayes pays Mrs. Cheatham what he owes her.'

"It is obvious that, even if Mrs. Cheatham had the legal title to lot 64, she was not *obliged* to refuse to convey it until the money she had loaned H. M. Hayes in an independent transaction had been repaid. It was a matter about which she could do as she pleased. Certain it is, that it was none of the Belmont Land Company's business

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whether she demanded her debt of her brother or not. And equally certain it is, that she never did make any demand, or refuse to convey lot No. 64, for the reason such demand was not complied with; neither is *she* doing so directly or indirectly in this case. It follows that the Belmont Land Company has no right to do so."

We reply to this that she *did* retain the legal title, and that, many years before the Belmont Land Company acquired any interest, she took from Hayes a relinquishment of his equitable title, and in part payment of the debt on account of which she was entitled to withhold the legal title. The creditor has long since asserted this right, and the debtor has recognized it. The Belmont company simply insists that at that time the purchaser at execution sale had no such legal or equitable right as would prevent this relinquishment from taking effect. What was done *then* was in accordance with the legal and equitable rights of the persons respectively owning the legal and equitable titles. The status of Mrs. Evans is no better than that of Henry M. Hayes. At most, she, in 1873, acquired his *equitable* title, and held it subject to the superior equity of Mrs. Cheatham.

The assignee of such a title, whether by deed or operation of law, must take it subject to all the equities against the assignor. One of the deeds which clouds her title, and which, by this bill, she seeks to cancel, is the quitclaim and relinquishment, executed in 1876, by Henry Hayes to Mrs.

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Cheatham. If this relinquishment was upon a full and fair consideration, and in part satisfaction of a debt, to secure which she was entitled to withhold the legal title, then it should not be disturbed. Its effect was to do, by agreement between creditor and debtor, precisely what a Court of Equity would have done, although the debtor had assigned his equity, or, by operation of law, it had passed to another.

The case of *Williams v. Love, supra*, is an instructive one concerning the rights of a purchaser of an equitable title. Love and McLemore jointly owned two tracts of land, each owning an undivided one-half. By agreement the title had been taken in Love's name. While thus held, McLemore became indebted to Love, partly on account of the land matter, but more largely by reason of wholly independent transactions. While thus indebted, McLemore conveyed an undivided one-half in trust to Gwinn, to secure Gwinn in certain indebtedness. When Gwinn took this conveyance he was indebted to Love in a large sum. Afterward, Gwinn assigned his debts on McLemore to Williams, and also assigned his interest in and under the trust. Williams now filed a bill against Love's heirs and executors, and against McLemore and Gwinn, to subject McLemore's one undivided half in the land held by Love to the satisfaction of the claim so assigned to him. This Court held that the rule which was applicable to McLemore was applicable to his assignee, Gwinn, and that

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he could not obtain the title until the debt due from him to Love was also paid. The Court said:

"The equity of the estate [of Love] being at least equal to that of McLemore or Gwinn, and the executors, heirs, and devisees of Love having the legal title in these lands, must, in a Court of Equity, prevail. Williams, in this case, is in no better situation than Gwinn, and Gwinn in no better condition than McLemore. There is no better settled rule in equity than this, that a purchaser of an equitable title must always abide by the case of the person from whom he buys." 2 Head, 86.

In view of the equities in favor of Mrs. Cheatham at date of the levy under which complainant holds, is there any case for the application of the doctrine of equitable estoppel? The effect of such estoppel upon a title is thus stated in Beach on Modern Equity Jurisprudence:

"The fact that real estate is affected does not prevent the application of the doctrine of equitable estoppel. The authorities establish the doctrine that the owner of real estate may, by an act *in pais*, preclude himself from asserting his legal title; and where this principle is applied to real estate, it is *effective as a deed would be* from the party estopped." Vol. II., Sec. 1113.

With respect to the same doctrine, Mr. Pomeroy says:

"While the owner of the land may, by acts *in pais*, preclude himself from asserting his legal title,

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it is obvious that the doctrine should be sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity. It is opposed to the letter of the statute of frauds, and it would greatly tend to the insecurity of titles, if they were allowed to be affected by parol evidence of light and doubtful character." 2 P'om. Eq., Sec. 801.

Again, he says:

"Equitable estoppel, in the modern sense, arises from the *conduct* of the party, using that word in its broadest meaning, as including his spoken or written words, his positive acts, and his silence or negative omission to do any thing. Its foundation is justice and good conscience. Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed, or been enforceable by other rules of law, unless prevented by an estoppel; and its practical effect is, from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel." *Id.*, Sec. 802.

The Chancellor seemed to be of opinion that a mere execution creditor, or a purchaser at such a sale, occupied, in some way, a better situation than did the execution debtor. We have already seen that there is no foundation whatever for this assumption. Such a purchaser must abide by the title of the execution debtor, non-registration out of the way. Mrs. Cheatham in no way misled, by

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any *conduct*, this purchaser. She was not at the sale, said nothing to induce the levy. The single fact that she had permitted the partition of the Edgar land as if part of the Hayes land, and afterwards recognized the plan of the Hayes subdivision by buying certain other lots shown on said plan, constitutes her *conduct*. After this subdivision, and after part of the Edgar land had been set off to H. M. Hayes, a new equity arose in her favor, and against H. M. Hayes, by reason of his indebtedness to her. She had the legal title, and was not thereafter bound to surrender it until her debt was paid. The creditor, who levied upon a mere equitable title, now seeks to show that it was in fact a legal title, by ignoring this equity, which arose in her favor so soon as lot sixty-four fell to H. M. Hayes, or, at any rate, so soon as he thereafter became indebted to her, and thus estopping her to deny that she had already conveyed the legal title. It would be inequitable and unjust to set up an equitable estoppel under these facts.

Discussing the circumstances under which an equitable estoppel arises, Mr. Justice Swayne said:

"This remedy is always so applied as to promote justice. It is available only for protection, and it cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond that." 100 U. S., 581.

We have discussed this case upon the assump-

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tion that the legal title to the Edgar land was in Mrs. Cheatham. This has been the theory of complainants, and certainly is as favorable a view of the matter as could be taken. In fact, this was not so. So far as the evidence shows, Mrs. Cheatham had no kind of title, legal, equitable, or pecuniary, in 1865, at date of the agreement for partition, or in 1873, at date of levy and sale of this lot. The legal title was in the heirs of Dr. J. T. Edgar until after institution of this suit, when it was conveyed by those heirs to the Belmont company. Mrs. Cheatham had for many years claimed this property, and she had possession from 1847 to 1863, when her inclosures were broken down, and not restored until 1884. Having had no color of title, her possessory right was lost by abandonment of possession in 1863. The possession which began in 1884 was ineffectual as a bar of the Edgar title, because that title was then in persons under disability.

The complainant has no such case as to prevent the defendant company from either acquiring this outstanding title, or relying upon it as an outstanding superior title. Complainant's case stands upon its best presentation when it is assumed that Mrs. Cheatham had the title when she agreed that this land might be partitioned. It is therefore unnecessary to consider the case further. She obtained this lot for a trivial sum. She stood by for seventeen years without taking possession, or endeavoring to assert her title. The property has

Evans v. Belmont Land Co.

since greatly advanced in value. The equities of the defendant company are fully equal to her own. In such case, the legal title must prevail, whether it be outstanding or in defendant.

Reverse the decree, and dismiss the bill.

Turnpike Cases.

92	369
117	765

TURNPIKE CASES.

(Nashville. March 9, 1893.)

1. CONSTITUTIONAL LAW. *Act 1891, imposing privilege tax on turnpikes, valid.*

Acts 1891, Ch. 25, p. 67, imposing an annual privilege tax of \$25 upon "each toll-gate on turnpikes that collect toll for both ways," is constitutional and valid.

Act construed: Acts 1891, Ch. 25, p. 67.

2. SAME. *Same.*

The Legislature has power to declare the business of running a turnpike for tolls a privilege, and tax it as such.

Constitution construed: Art. II., § 28.

Cases cited and approved: Kurth v. State, 86 Tenn., 736; Columbia v. Guest, 3 Head, 414; Jenkins v. Erwin, 8 Heis., 456.

3. SAME. *Same.*

This statute is not vicious class legislation. The classification adopted is not arbitrary or capricious. Substantial distinctions exist, from the taxation point of view, between turnpikes charging "toll for both ways," and those charging toll only one way, or not at all.

4. SAME. *Same.*

This statute is not invalid upon the ground that it violates the charter contracts of turnpike companies. Corporations take their franchises and privileges, in the absence of explicit contract for exemption, subject to the State's right to impose license or other taxes thereon.

Cases cited and approved: Memphis Gas Co. v. Shelby County, 109 U. S., 398; 143 U. S., 198.

5. TAXATION. *Exemptions from.*

Exemptions from taxation are never allowed unless they are granted in "clear and unmistakable words." Every doubt and presumption prevails against them.

Cases cited and approved: Memphis v. Bank and Ins. Co., 91 Tenn., 546, 550; 18 Wall., 226; 117 U. S., 136; 143 U. S., 195.

Turnpike Cases.

6. SAME. *Charter construed as giving no exemption.*

A turnpike company has no exemption from taxation where it is granted, by legislative charter, "all the rights, powers, and privileges" of an existing company, whose charter contained an exemption from taxation. Exemption from taxation is not embraced in the terms "rights, powers, and privileges."

Cases cited and approved : Wilson *v.* Gaines, 9 Bax., 546 ; Memphis *v.* Phoenix Ins. Co., 91 Tenn., 567.

NASHVILLE, ETC., TURNPIKE CO. *v.* WHITE.

FROM RUTHERFORD.

Appeal from Chancery Court of Rutherford County.
W. S. BEARDEN, Ch.

H. E. PALMER and R. McPHAIL SMITH for Turnpike Co.

Attorney-general PICKLE for White.

WALLACE *v.* CORNERSVILLE, etc., TURNPIKE CO.

FROM MARSHALL.

Appeal in error from Circuit Court of Marshall County. E. D. PATTERSON, J.

DECEMBER T

Turnpike Co.

Attorney-general PICKLE :
Wallace.

JAMES TURNERY, J. H. LE
for Turnpike Co.

A. D. BRIGHT, Sp. J. By
Assembly of Tennessee, passed
1891, a privilege tax of
annum was levied upon each
that collect toll for both ways.
said Act it is made a misdemeanor
any of the privileges enumerated
out first paying the tax for
exercise of said privilege; and
shall be liable to a fine of
the amount of taxes owed to
State, and, in addition, a
cent.

The complainant, the
and Shelbyville Turnpike Company,
by the State of Tennessee,
contract of exemption of
The complainant is a turnpike
toll both ways. It paid
the Clerk of the County
County, under protest, and
under the statute, to recover
murrer, the bill was dismissed
and complainant has appealed
by them that this toll-gate
constitutional and void, and is

Turnpike Cases.

8, Article I., of the Constitution, and "is not the law of the land," and that said tax impairs the obligation of the contract contained in complainant's charter, and because arbitrary and irrational, and an inadmissible exercise of the taxing power.

Under the Constitution, Article II., Section 28, it is provided that "the Legislature shall have power to tax merchants, peddlers, and privileges in such manner as they may, from time to time, direct." Construing this section of our Constitution, this Court has defined a privilege to be whatever the Legislature chooses to declare to be a privilege, meaning thereby that whatever occupation affects the public may be so classed and taxed as such. 2 Pickle, 136; 3 Head, 414; 8 Heis., 456.

The same question herein presented came before this Court in the case of the *Memphis Gas Co. v. Shelby County*. This case was carried, by writ of error, to the Supreme Court of the United States, which Court upheld the right to impose the privilege tax upon the gas company. The averment was made "that if no express contract against taxation can be found here [referring to the charter], it must be implied, because to permit the State to tax this company, by a license tax, for the privilege granted by its charter is to destroy that privilege. But the answer [says the Court] is that the company took their charter subject to the same right of taxation in the State that applies to all other privileges, and to all other property. If they wished or intended to have an exemption

Turnpike Cases.

of any kind from taxation, or felt that it was necessary to the profitable working of their business, they should have required a provision to that effect in their charter." 109 U. S., 398.

In 143 U. S., 198, this case is cited and approved, and same principle decided and adhered to.

It is well settled that exemption from taxation is never presumed. The Legislature itself cannot be held to have intended to surrender the taxing power, unless its intention to do so has been declared in clear and unmistakable words. 143 U. S., 195.

The right of taxation is inherent. It is a prerogative essential to the perpetuity of the Government; and he who claims an exemption from the common burden, must justify his claim by the clearest grant of organic or statute law. 7 Pickle, 550.

"If a doubt arise as to the intent of the Legislature, that doubt must be solved in favor of the State." 18 Wallace, 226.

The presumption is always "against any surrender of the taxing power." 117 U. S., 136. Cited and approved in 7 Pickle, 550.

"The right of taxation is inherent in the State." 7 Pickle, 546.

We therefore hold, in view of the above authorities, the precise point involved in this case being decided in 143 and 109 U. S. Reports as above cited, that the Legislature had the right to levy the privilege tax upon the complainants, and

Turnpike Cases.

that same is constitutional, and not arbitrary or irrational.

It therefore follows that the decree of the Chancellor dismissing the bill is correct, and will be affirmed with costs.

The case of *Wallace v. The Cornersville and Lewisburg Turnpike Company* presents this additional question. By their charter, Section 3, it provides: "The president and directors of said company shall have all the powers and perform all the duties that are required of and allowed by law to the Lebanon and Nashville Turnpike Company; and the said body-corporate shall have, enjoy, and possess all the rights, powers, and privileges, subject to the same conditions, limitations, and restrictions granted to and imposed upon the Lebanon and Nashville Turnpike Company, except so far as the provisions of this Act and the laws of the State come in conflict with the same."

In Section 5 of Act incorporating the Lebanon and Nashville Turnpike Company is provided as follows: "The property in said road, when completed, shall vest in the said company and their successors for the purpose of a highway, which shall be free for all persons on the terms and conditions herein prescribed, and the same shall not be liable to taxation."

It is now insisted that this is a contract between the State and turnpike company to exempt same from taxation, and, therefore, on this ground

Turnpike Cases.

also the turnpike company is not liable to the privilege tax imposed by the Acts of 1891.

Exemptions from taxation are contrary to public policy, and can only be granted in clear and unmistakable terms. They are not creatures of intentment or presumption.

It has been repeatedly held by this Court that the term "privilege" did not include exemption, nor was it so intended by the Legislature in its use in the Act referred to.

Under the decision of the case of *Wilson v. Gaines*, 9 Bax., 546, and authorities there cited and re-affirmed in 7 Pickle, 567, which is decisive of this case on this point, we hold that there is no contract of exemption in the charter of the turnpike company, and they are liable for said privilege tax.

The Circuit Judge held otherwise, and the case is reversed, and petition for *certiorari* dismissed and *supersedeas* discharged, and appellees are taxed with the costs of this cause.

Cowan v. Singer Manufacturing Co.

92 376
110 129

COWAN v. SINGER MANUFACTURING CO.

(Nashville. March 9, 1893.)

1. SALE. *Transaction held to be a sale and not a lease.*

The transaction constitutes a conditional sale, and not a lease, where a sewing-machine company contracts a machine to a customer for a stipulated price, to be paid in installments, delivering the machine with intent that it should be his upon payment of the price agreed upon, but retaining the title to secure the payment thereof. And it is immaterial that the transaction is disguised by calling it a "lease," and providing that installments of purchase-price shall be paid "as rent." The substance, not the mere form of the transaction, will be regarded by the courts.

2. CONDITIONAL SALES. *Rights and remedies of parties upon purchaser's default.*

Since Acts 1889, Ch. 81, the purchaser of personalty, the title of which remains in the seller to secure the purchase-price, may recover of the seller the entire amount paid on the contract, without set-off or abatement for the use of the property, where, after the purchaser's default in meeting installments of the purchase-money, the seller retakes possession of the property in the lawful exercise of his rights under the contract, but thereafter treats and claims the property as his own, and fails to advertise and sell same, as authorized and required by said Act.

3. SUPREME COURT PRACTICE. *Weight of Judge's findings of fact.*

Doctrine re-affirmed that this Court will give the same weight to the trial Judge's finding of facts, in cases tried by him without jury, as to the verdict of a jury.

Cases cited and approved: Eller v. Richardson, 89 Tenn., 580; Sahlien v. Bank, 90 Tenn., 228.

4. SAME. *Proper judgment rendered here.*

Upon reversal of a law case tried by the Judge without jury, this Court

Cowan *v.* Singer Manufacturing Co.

will ordinarily render final judgment without remanding to the lower Court.

FROM RUTHERFORD.

Appeal from Circuit Court of Rutherford County.
ROBERT CANTRELL, J.

B. F. LILLARD for Cowan.

P. P. MASON for Singer Manufacturing Co.

CALDWELL, J. This is an action of debt originating before a Magistrate, and afterwards tried, on appeal, in the Circuit Court by the presiding Judge without the intervention of a jury.

The plaintiff, Mary E. Cowan, claimed that she purchased a sewing-machine from the defendant, the Singer Manufacturing Company, at the price of \$55, payable in small installments, and upon agreement that the legal title should remain in the defendant until the full consideration should be paid. She further claimed that, after she had paid \$41.70 on the machine, the defendant regained possession of it, and appropriated it absolutely to its own use, without advertisement and sale, as required by law.

The suit was brought, and is prosecuted under Chapter 81 of the Acts of 1889, to recover the \$41.70 claimed to have been paid on the machine.

Cowan v. Singer Manufacturing Co.

The defendant admitted that it placed the machine in the possession of the plaintiff, but insisted that she took it under a *lease*, whereby she bound herself to pay, "as rent," for the machine \$55 in eighteen separate installments; and agreed that, in case of default in any one of such payments, the *lease* should be deemed forfeited, at the election of the defendant, and the possession of the machine recoverable by the defendant without formal notice or process of law.

Though claiming that the contract was a *lease*, and not a *conditional sale*, the defendant admitted that "the machine was valued at \$55," and that, had, that amount been paid, "the machine, under the rules of the company, would belong to the plaintiff."

It was virtually agreed that the plaintiff kept the machine twenty-four months; that she did not pay all the installments, whether of purchase-money or rent, as they matured; that the defendant regained possession of the machine by action of replevin, and assumed the rights of absolute ownership without making advertisement or sale in any manner, and without agreement to waive a sale.

The defendant admitted the receipt from plaintiff of \$33.70 under the contract; but, by plea of set-off, claimed that plaintiff owed it \$72 altogether for rent of the machine for twenty-four months, and that the plaintiff was therefore indebted to it, after repaying the \$33.70, in the sum of \$38.30, for which it sought judgment over.

Cowan *v.* Singer Manufacturing Co.

The trial Judge found, from the whole proof, that the contract between the parties was not a *lease*, but a *conditional sale*, with a reservation of the title by the defendant; that the plaintiff had paid \$36.70 on the purchase-price of the machine; that upon default of further payments the defendant regained and retained possession of the machine under claim of ownership; and, finally, that \$24 were reasonable compensation for the use of the machine while in plaintiff's possession.

Upon those findings of fact, the trial Judge was of opinion, and adjudged, that the plaintiff was entitled to recover of the defendant the \$36.70 paid on the machine, less \$24, allowed as a credit for its use by plaintiff.

Neither party being satisfied with that judgment, both of them appealed in error to this Court.

It is a familiar rule that the findings of fact by a Circuit Judge have the same weight in this Court as the verdict of a jury upon disputed questions, and that they will not be disturbed if supported by any material evidence. *Eller v. Richardson*, 89 Tenn., 580; *Sahlien v. Bank*, 90 Tenn., 228.

That rule need not be invoked in this case, however, for without it, and upon a full consideration of the evidence *de novo*, we would have no hesitancy in affirming the conclusions of fact announced by the trial Judge. The only material controversy in the record upon matters of fact is with respect to the nature of the contract under

Cowan v. Singer Manufacturing Co.

which plaintiff received the machine. That contract is clearly shown, to have been a *conditional sale*, with retention of title, and not a *lease*. We would so hold upon the evidence of the defendant alone, though it makes a vigorous effort to support the theory of a lease. Whatever the defendant may have called it at the time, or may call it now, the transaction, from its very nature, could have been nothing more nor less than a conditional sale of the machine, with retention of title in the seller as security for the unpaid part of the purchase-price.

Such having been the contract, the case falls within, and is governed by, Chapter 81 of the Acts of 1889.

So much of that statute as is applicable to the particular facts before us is as follows:

"That hereafter, when any personal property is sold upon condition that the title remain in the seller until that part of the consideration remaining unpaid is paid, it shall be the duty of said seller, having regained possession of said property because of the consideration remaining unpaid at maturity, to, within ten days after regaining said possession, advertise said property for sale, for cash, to the highest bidder, * * * [and] unless the debt is satisfied before the day of sale, then it shall be the duty of said original seller, or his agent, * * * to offer for sale and sell said property as provided above, and with the proceeds of said sale satisfy the amount of his claim arising from

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said conditional sale above mentioned, and the expenses of advertisement, if any, and the remainder of said proceeds, if any, he shall pay over to the original purchaser; *Provided*, The said original seller and purchaser may at any time, by agreement, waive the sale provided in this Act." Sec. 1.

"That should said property, at the sale provided by this Act, fail to realize a sufficient sum to satisfy the claim of the seller, the balance still remaining due on said claim shall be and continue a valid and legal indebtedness as against said original purchaser." Sec. 3.

"That should the seller, having regained possession of said property, fail to advertise and sell the same as provided by this Act (unless said sale is waived as provided), the original purchaser may recover from said seller that part of the consideration paid, in an action for the same before any Justice of the Peace or Court having jurisdiction of the amount." Sec. 4.

The object and intent of this statute are plain. By the words employed both seller and purchaser are recognized as having interests in the property contemplated, and by them provision is made for the full protection and enforcement of their respective rights.

The seller is interested to the extent of his unpaid debt against the property, and what is left after payment of that debt belongs to the purchaser. The seller is not allowed to regain the property, for which he has received a part of the

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price, and, without more, hold it as his own, in disregard of the purchaser's interest, as the defendant in the case at bar attempted to do; but, having regained the property, he must sell it as provided in the first section of the Act, and, after retaining a sum sufficient to pay the balance due him on the price, and the expenses of the sale, pay the surplus, if any, to the original purchaser. If he choose to hold the property without sale, or waiver of sale, as the defendant before us has done, then, under the fourth section, he becomes unconditionally liable to the purchaser for the full amount of the consideration paid. By disregarding the requirement of the first section, the seller's liability to the purchaser becomes absolute under the fourth section. In that case the seller will not be heard to dispute his liability for the full amount received, or allowed to diminish it by any claim for use of the property while in the hands of the purchaser. The sale and delivery to the purchaser contemplate that he shall use the property as his own so long as he is not in default as to some deferred payment, and, in fact, until the seller shall seek to regain possession. That is his right under the law of his contract, and by its enjoyment he incurs no liability to the seller.

If the property should deteriorate in value while in the possession of the purchaser, the seller, upon recovering it, can protect himself by sale under the first section of the Act, and by suit under the third section for such balance of his

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debt as may remain unpaid after the application of the proceeds of sale. At least that is the course pointed out to him by the plain terms of the Act, and he must follow it, or suffer the consequences of his failure to do so.

If he ignore the remedy thus expressly provided, and assume to be a law unto himself by appropriating the property as reclaimed and without a resale, he becomes bound to repay the purchaser the full amount received from him without abatement for use, or otherwise.

The *duty* of the original seller to resell the property upon reclamation by him is *positive*, and failure to perform that duty fixes upon him *absolute responsibility* to the purchaser for the purchase-money previously paid. Only an *agreement to waive a resale* will relieve him of the statutory duty of selling, and save him from liability for the money received.

There is no claim or proof of such an agreement in this case, hence there is no effectual defense to the plaintiff's action, in whole or in part. The fact that she used the machine for two years, and that its use for that period of time was reasonably worth \$24, as found by the trial Judge, affords no ground for cross-action or set-off; for, from the nature of the contract under which she acquired possession, and as a matter of law, she was, as already stated, entitled to use the machine as her own property; and, for that use, she incurred no liability, either legal or equitable. It was error,

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therefore, to charge her for the use, and thereby diminish her recovery by the amount of \$24.

The case having been tried without a jury, this Court, upon reversal, will pronounce the judgment which the trial Judge should have rendered. *Glasgow v. Turner*, 91 Tenn., 167, and cases there cited.

Enter judgment in favor of the plaintiff and against the defendant for the sum of \$36.70, with interest from the commencement of this action and costs of suit.

Allen v. Goodwin.

ALLEN v. GOODWIN.

(Nashville. March 11, 1893.)

1. MASTER AND SERVANT. *Master's liability for superior's negligence resulting in injury to inferior fellow-servant.*

The master is not liable for the personal negligence, but only for the official negligence of his superior servant, causing injury to an inferior fellow-servant. Superiority in rank of the negligent over the injured servant, does not, in such case, fix the master's liability, but "in order to charge the master with such negligence, the superior servant must so far stand in the place of the master as to be charged, in the particular matter, with the performance of a duty toward the inferior servant, which, under the law, the master owes that servant."

Cases cited and approved: Fox v. Sandford, 4 Sneed, 36; Railroad v. Elliott, 1 Cold., 611; Railroad v. Wheless, 10 Lea, 741; Railroad v. Rush, 15 Lea, 151; Railroad v. Handman, 13 Lea, 423; Railroad v. Lahr, 86 Tenn., 340; Coal Creek M. & M. Co. v. Davis, 90 Tenn., 711.

2. SAME. Same. Erroneous charge.

A proper charge, upon the facts of this case, should have stated the distinction, as regards the master's liability for injuries resulting to an inferior servant, between personal and official negligence of a superior servant. The charge given ignored this distinction, and was calculated to mislead the jury into the belief that the master was liable to an inferior servant for the results of the personal negligence of his superior fellow-servant. *Held:* This was error, even in the absence of any requests for a fuller exposition of the law.

Cases cited and approved: Fox v. Sandford, 4 Sneed, 36; Railroad v. Rush, 25 Lea, 151.

3. SAME. Same.

The master will not be liable for injury resulting to his servant from negligence of an alleged superior servant, unless the negligent servant was in fact the superior of the injured fellow-servant at the time.

Allen v. Goodwin.

It will not suffice that the injured servant believed the negligent servant to be his superior, if no such relation existed in fact by the master's appointment.

FROM MAURY.

Appeal in error from Circuit Court of Maury County. E. D. PATTERSON, J.

FUSSELL & WILKES for Allen.

VOORHEIS & FOWLER and SAM HOLDING for Goodwin.

WILKES, J. The plaintiff, a minor, by next friend, sued the defendant for damages for a physical injury received while in defendant's employ.

It is charged that the injury was the result of the negligence of one Gallagher, who, it is alleged, was foreman for defendant in the erection of certain United States arsenal buildings at Columbia, Tennessee, in 1891. The case was tried before a jury, and verdict was given for \$250 damages, upon which judgment was entered, and an appeal is prayed to this Court by defendant.

Many errors are assigned, but we deem it unnecessary to pass upon them all.

The injury was inflicted under the following circumstances: Plaintiff was engaged in dressing a stone pilaster in the building, and was standing

Allen v. Goodwin.

upon a platform about twenty feet from the ground. Gallagher was working above him, near the cornice, trimming a hole in the stone, and fitting in the same a piece of pipe. This piece of the pipe, about two feet long and five inches in diameter, fell through the hole upon the plaintiff, striking him on the bridge of the nose, cutting through it and extending downward, causing a permanent scar and disfigurement of the face. Under the facts in this case, we think there is error in the Court in not charging the jury properly and fully as to the distinction between the personal negligence of Gallagher and his negligence in a matter in which he stood in the place of and represented the master as his vice principal—in other words, between personal and official negligence. The mere fact that an injury results from the negligence of a servant superior in rank to the injured servant does not render the master liable, but, in order to charge the master with such negligence, the superior servant must so far stand in the place of the master as to be charged in the particular matter with the performance of a duty towards the inferior servant, which, under the law, the master owes that servant. *Fox v. Sandford*, 4 Sneed, 36; *N. & C. R. R. v. Elliott*, 1 Cold., 611; *N. C., & St. L. R. R. v. Wheless*, 10 Lea, 741; *Railroad Co. v. Rush*, 15 Lea, 151; *Railroad Co. v. Handman*, 13 Lea, 423; *Railroad Co. v. Lahr*, 2 Pickle, 340; *Coal Creek Mining Co. v. Davis*, 6 Pickle, 711.

Allen v. Goodwin.

In *Coal Creek Mining Co. v. Davis*, 6 Pick., 718, this Court said:

"When there is proof tending to show negligence of a superior servant, whereby an inferior servant has been injured, the jury should be instructed that the mere superiority of grade or rank will not determine the liability of the common employer, but that they must look and see whether the negligence was in regard to some duty to the inferior imposed by law upon the master, and by the master intrusted to the negligent superior servant."

It is true the defendant in this case did not ask for more specific instructions in regard to this distinction so well recognized in the cases, but so difficult to apply, and ordinarily such failure would constitute a waiver and bar to assigning the same as error; but on looking to the charge as a whole, we think it was calculated to mislead the jury into believing that if Gallagher was foreman for defendant, and pointed out to plaintiff the work to be done by him, therefore he was the vice-principal, and the master would be liable for his acts of negligence.

A foreman is one who takes the lead in the work, and may or may not have authority over his fellow-workmen, and, because he takes this lead and points out the work to be done, it does not necessarily follow that he stands in the place of the master.

The case of *Fox v. Sandford*, 4 Sneed, 36, illus-

Allen *v.* Goodwin.

trates this distinction. In that case Sandford and Fox were both employed in the construction of a building, and Sandford was "foreman" of the job. The injury resulted from his negligence, but the Court held the common master not liable, because Fox and Sandford were fellow-servants engaged in the same employment under one master. It is well to note that in that case, although the master was not held liable, the foreman was so held.

In *Railroad Co. v. Rush*, 15 Lea, 151, the Court says: "Several servants of different grades, when employed in a common service—as an engineer and fireman, *foreman of a job and common laborer*—are fellow-servants. The mere fact that the negligent servant is, in his grade of employment, superior to the servant injured does not render the master liable."

The important point is not what name he bears, but what authority does he have.

The Court also charged the jury that if the plaintiff had reasonable grounds to believe that Gallagher was foreman, and that he was obeying his orders as such, and that he had received no information that Gallagher had ceased to be foreman, then for the purposes of the suit he must be considered as foreman, even though as matter of fact he may have been discharged in the absence of plaintiff and without his knowledge, and was not such foreman at the time the injury occurred. This also is error. Gallagher must not only have been "foreman" in fact at the time,

Allen *v.* Goodwin.

but he must have been so in the sense of being a vice-principal, and standing in the place of the master.

For these reasons the judgment is reversed and cause remanded.

Vick v. Gower.

VICK v. GOWER.

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d110 651

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(Nashville. March 10, 1893.)

1. SEPARATE ESTATE. *What constitutes. Example.*

A husband's deed conveying to his wife a life estate in a house and lot, vests her with a separate estate therein by this clause, to wit: "And during the life of my wife, she is hereby authorized and empowered to collect the rents of said house and lot, and to use the same in any manner she may elect, to her separate use, and free from my debts, contracts, or control." The conveyance of the entire rents of the land for life, and to her separate use, is the equivalent of a conveyance of the land itself for life and to her separate use.

Case cited and approved: Davis v. Williams, 85 Tenn., 651.

2. SAME. *May be conveyed by wife to husband.*

A married woman is empowered by statute in this State to convey her lands, held as a separate estate, in the same manner as if unmarried. She can lawfully convey her lands; held as separate estate, by deed made direct to her husband, but such deed will be more narrowly scrutinized than one made to a third person.

Code construed: § 3350 (M. & V.); § 2486c (T. & S.).

Cases cited and approved: McLin v. Haywood, 90 Tenn., 195; Powell v. Powell, 9 Hum., 477.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
ANDREW ALLISON, Ch.

FIRMAN SMITH for Vick.

Vick *v.* Gower.

MERRITT & ACKLEN and JOHN D. BRIEN for
Gower.

LURTON, C. J. Complainant, Mrs. Vick, and the defendant, Gower, were husband and wife. In 1887 she obtained a divorce, and since has contracted a marriage with her present husband and co-complainant, Thos. Vick. During her marriage to Gower, he conveyed to her, by deed, a life interest in a certain house and lot. Several years afterwards, and in 1884, she reconveyed to him this interest. The present bill was filed in 1891 to cancel her deed and recover possession.

The first ground upon which this relief is asked is that her reconveyance was without consideration, and upon false and fraudulent promises and representations. It is enough to say, as to this ground, that it is not made out.

The second ground urged is that the deed was procured by undue influences and moral coercion. In the light of the marital history of this couple, we do not think she has made out that sort of duress or undue influence necessary to give her relief, especially after so long a delay in asserting her claims after she had shaken off all influence and control of her former husband, by contracting a new marital relation.

The third ground is that she had no power to make the deed.

It is first insisted that the interest conveyed to her was a general one, and not a separate estate,

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and that, not being a separate estate, she could not convey, save by deed in which her husband joined. To determine the character of her interest, it is necessary to recite certain points of the deed under which she held. After reciting that the consideration to be love and affection, the deed proceeds as follows: "I have this day bargained, sold, aliened, and conveyed to said Margaret J. Gower, one lot. * * * To have and to hold said house and lot to the said M. J. Gower during her natural life, and, at her death, the same to revert and vest in me, O. C. Gower; and, in the event we should die without issue born to us, then said house and lot to go to my heirs. And during the life of my wife, Margaret J. Gower, she is hereby authorized and empowered to collect the rents of said house and lot, and to use the same in any manner she may elect, to her separate use, and free from my debts, contracts, or control."

The argument is that a general estate for life is conveyed in the property, and a separate estate in the rents only. This is fallacious. The whole instrument, taken together, makes it an estate for life, to the sole and separate use of the wife. A conveyance of the entire rents and profits for life would, in legal effect, be a conveyance of an estate for life. *Davis v. Williams*, 85 Tenn., 651.

It is next insisted that if it be conceded that her interest in this property was a separate estate, still, she had no power to convey to her husband.

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The Act of 1869-70, being § 3350, Code of M. & V., provides that:

"Married women, owning a separate estate settled upon them, and for their separate use, shall have and possess the same power of disposition by deed, will, or otherwise as if unmarried; *Provided*, The power of disposition is not expressly withheld in the deed or will under which they hold the property."

The deed under which Mrs. Gower held this estate imposed no limitation upon her power of disposition.

This property being a separate estate, she had power, under the statute, to convey by deed, as if an *unmarried woman*. The power could not be conferred in broader terms. The concurrence of her husband was unnecessary to make her deed valid. But it is argued that this power may exist and be ample to enable her to convey to any but her husband; that at common law he has no power to contract with her, nor to receive a deed from her. This objection is based upon the theory of the legal unity of husband and wife, and upon the suggestion that the wife is to be supposed incapable of exercising her own judgment, and has no freedom of will when dealing with her husband. But the argument which would prevent the wife from conveying to the husband would likewise destroy the title which complainant asserts.

At the common law the disability of husband and wife to contract with or convey to each other,

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was mutual. Complainant holds her estate by deed direct from her husband, and if her conveyance to him is to be held void upon the common law disability of husband and wife to convey to each other, then her own title must fail. This disability has long since been ignored in this State, and direct conveyances by the husband to the wife have been a matter of daily occurrence, and their validity unquestioned. *McLin v. Haywood*, 6 Pick., 195.

The power of the wife to contract with her husband with reference to her separate personal estate has long been recognized by Courts of Equity. With regard to *that* estate, husband and wife have been regarded in equity as distinct persons. She might contract with him in regard to it, lend it to him, or give it to him. *Powell v. Powell*, 9 Hum., 477.

The opinion of Judge Turley in that case is a full and strong presentation of the power of the wife over her separate estate, and contains a full citation of the authorities, English and American. Concerning the dangers to be apprehended from upholding the power of a wife to deal with her husband concerning her separate estate, this Court, in that case, said that "in such cases a Court of Equity looks at the transaction with a more jealous and watchful eye than it would feel itself called upon to do in ordinary cases, where each of the parties were *sui juris*; for although, as to her separate property, a married woman is considered

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in a Court of Equity as a *feme sole*, yet this does not free her from the natural influence of her husband, and therefore the Court always views her dealings with him concerning her separate estate with suspicion and scrutiny." 9 Hum., 481.

The statute has put a woman owning real estate, to her sole, and separate use, upon the same footing, with regard to her right and power of disposition, as she before was in regard to personal estate held to her separate use. She may convey now as if an unmarried woman. If she convey such separate real estate to her husband, the transaction will be more narrowly looked upon, when questioned, than if her deed had been to a stranger. But, under the statute, there is no more reason for doubting the power of a married woman owning real estate, settled to her sole and separate use, to convey it to her husband, than there is for questioning her power to convey, or give, her separate personal estate to her husband.

Affirm the decree.

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(Nashville. March 11, 1893.)

1. ARBITRAMENT AND AWARD. *Award void, when.*

An award is void, if the arbitrators fail to act as a body, or depart, in material respects, from the terms of the submission. The award in this case is void for both reasons.

Cases cited and approved: Mays *v.* Myatt, 3 Bax., 309; Toomey *v.* Nichols, 6 Heis., 162.

2. SAME. *Same. Ratification and estoppel.*

Neither ratification of the award can be inferred, nor estoppel to deny its validity invoked, against complainant, upon the facts of this record.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.

ANDREW ALLISON, Ch.

W. T. TURLEY and W. D. COVINGTON for Palmer.

JAS. S. PILCHER and JNO. M. GAUT for VanWyck.

A. D. BRIGHT, Sp. J. The defendants in this case, the Wilkins heirs, sold to complainant, L. D. Palmer, a piece of ground in Nashville by deed containing the usual covenants of warranty. The land was described in the deed by metes and bounds, the call of the east line being the middle

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of Spruce Street, and of the north line the middle of an alley. For the purposes of a judicial sale, this and other land adjacent had been previously divided into lots and the plan registered, and in this division the alley had been widened into a street called Lee Avenue. At the time of the sale from defendants to complainant it was not believed that, as to this land, any thing had been done by the city of Nashville to consummate the apparent dedication of the streets and alleys. Such proved to be the fact as to all the numerous streets and alleys except Lee Avenue, located on the north margin. As to this avenue, the city claimed that the dedication was complete, and, some months after the sale, began to improve it as a street. Complainant filed a bill and enjoined the city. The bill was dismissed by the Chancellor, and his decree affirmed by this Court. Complainant then claimed that all of the covenants of warranty in the deed had been breached. In the meantime, one or more of the purchase notes given for the land had matured and were unpaid. Palmer claimed that he was entitled to a credit on the first one to the amount of his damages for the breach of warranty. It was then agreed between the parties that the matters in controversy should be settled by arbitration. It was agreed that all matters of law should be submitted to Hon. W. K. McAlister, his decision to be conclusive; and that if he should decide that the warranty had been breached, and that said vendors were liable

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therefor, then the question of amount of damages should be settled by three disinterested citizens; that the arbitrators should view the premises, and in accordance with the principles of law settled by Judge McAlister, determine whether Palmer was damaged, and, if so, how much, and that their decision should be final and conclusive; that if against Palmer, it should forever estop him, and if in his favor, the amount of the award should be credited on his note or notes.

Judge McAlister decided that Palmer, by his deed, obtained the fee to the land in controversy subject to the easement, and, therefore, that there had been no breach of any of the covenants except the one against incumbrances. Judge Whitworth and Lewis T. Baxter were selected as arbitrators, they to select a third arbitrator in case of disagreement, who was to act with them in reaching a conclusion. They failed to agree, and selected H. E. Jones as the third man. On October 7, 1889, an award was rendered to the effect that there was no damage, but as it had been decided by Judge McAlister that there was a breach of the warranty, defendants should pay the cost of the arbitration, which they fixed at \$75. Defendants paid the \$75. Complainant promised generally to pay his notes, and subsequently made two separate promises that if certain liens were released he would pay the first and second notes at once, and the third as soon as he could arrange to do so. In both instances the liens were released. He then filed this bill,

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and alleges that the decision of Baxter, Whitworth, and Jones is null and void, and asks that the Court render a decree in his favor for \$4,500 damages for breach of warranty. For the claim that the award is a nullity, four distinct grounds are laid, viz.:

1. That said arbitrators ignored Judge McAlister's decision, in that they decided that Palmer sustained no damages, whereas Judge McAlister decided that he was entitled to some substantial damages.
2. That they ignored his decision, in that they considered incidental benefits to the remaining property of complainant, resulting from the street in question.
3. That the third arbitrator, Jones, failed to confer with the other two before rendering a decision.
4. That Jones did not view the premises, but examined several real estate agents in the absence of the other two arbitrators, and in the absence and without the knowledge or consent of the complainant, and based his opinion and decision on the information thus derived.

Defendants, in their answer, relied on the award; denied that Judge McAlister's decision had been violated; denied that the rule of damages laid down by him had been violated; that it was not true, in fact, that the award was made without a conference between Jones and the other arbitrators; that they did meet and confer, and made the award, all signing same. Defendants further relied on Palmer's acquiescence in award; that Palmer

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was, by his various acts, doings, and promises, now estopped from maintaining the bill. Defendants also deny that complainant had sustained any damages. Answer alleges that Palmer had ratified the award.

The Chancellor decreed that the award was void, and same be set aside and for naught held, and referred the case to the Master to take proof and report the value of the land with and without the easement, and the difference, if any, he should report as the damages.

The Clerk and Master reported complainant's damage to be \$3,500. Upon exceptions by defendant, the Chancellor reduced the amount to \$2,500, and allowed damages for \$2,500 to be credited upon defendant's decree on the note. He decreed in defendant's favor on cross-bill for the note and interest—\$11,237, less the damages—leaving balance \$7,932, and defendants appealed, and assigned errors.

There is one further fact that should be stated. A deed was prepared and tendered Palmer to the land, which was refused by him, because reference was made in it to a subdivision of the property, which had been registered in 1884, which subdivision had an avenue or street forty feet wide on its northern boundary, Palmer saying that he had contracted to buy upon the assurance that an alley, and not a street, bounded the property on the north, and that he had conceived a subdivision on that assurance, and would not conclude his purchase unless it was true.

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Gaut, the agent of defendants, told him the city had no claim or right to a street across the property, but that he would write another deed, making no reference to the registered plan of 1884, which he did, and same was accepted by Palmer.

The first question presented on the record is, Shall or not the award of the arbitrators be set aside?

The article or agreement of arbitration between the parties stated, among other things, that "whereas, L. D. Palmer insists that the said strip of ground was included in said conveyance and warranty, and that the existence of said easement constitutes a breach of his warranty, and that he is damaged thereby." And, as we have seen, "all matters of law in controversy between the parties shall be submitted to the arbitrament and award of the Hon. W. K. McAlister, of Nashville, Tenn., and that his decision thereon shall be final and conclusive upon the parties hereto." It was further agreed "that should Judge McAlister decide that said warranties, or warranty, had been breached, and that said vendors are liable therefor, then the question of the amount of damages sustained by said Palmer shall be submitted to the arbitrament and award of three disinterested citizens, to be chosen by said Palmer and by John M. Gaut (representing said devisees), in such manner as they shall see fit. Said arbitrators shall view the premises, and, in accordance with the principles of law settled by Judge McAlister, shall determine whether

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or not said Palmer has been damaged, and, if so, to what amount; their decision to be final and conclusive between the parties."

Judge McAlister decided that the warranty against incumbrances had been breached. He laid down the "rule of damages to be the difference between the value of the lot without the easement of this street, and its value with the easement as an incumbrance thereon, considering of course its continuance and permanency. In determining the market value of the land at the date of sale, any special use which the purchaser may intend to make of it is not to measure his damages, either to increase or diminish his damages, but all the uses and capabilities of the property may be considered. Upon this basis the referees will assess the damages."

By agreement in writing, Judge James Whitworth and Lewis T. Baxter were selected by the parties to assess the damages sustained by Palmer for the breach of the covenant against incumbrances so decided by Judge McAlister, and under the rules for the measure of damages laid down by him. In case they should fail to agree, Whitworth and Baxter were authorized to select a third arbitrator to act with them in reaching a conclusion. It was expressly stipulated in this agreement selecting Whitworth and Baxter, that they should view the premises, and settle the question of damages as Judge McAlister had declared. Whitworth and Baxter failed to agree, and, under

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the agreement of arbitration, selected one H. E. Jones as the third arbitrator. Jones did not view the premises alone or with Whitworth and Baxter, but says he was well acquainted with the premises. Whitworth and Baxter submitted all the papers to Jones, who rendered a written opinion in the matter, in which he says that "the arbitrators, Whitworth and Baxter, have disagreed on the question as to whether the value of the land sold by the Wilkins heirs to L. D. Palmer, calling for a frontage along the middle of Spruce Street 273 feet to a point opposite the middle of an alley, and thence along the middle of said alley to the Chattanooga and St. Louis Railroad, a distance of about 900 or 1,000 feet, is diminished by the presence of a street, known as Lee Avenue, as shown on the plan presented, occupying, with the alley referred to, a space of 40 feet along the northern side of the ground." Jones says this was the only question referred to him as referee, and decides that the property was worth more with Lee Avenue opened than without it.

The arbitrators, Whitworth, Baxter, and Jones, made the following award in writing:

"The Court having decided that there was a breach of the covenant against incumbrances, and the referee concurring with one of the arbitrators that there is no damage to the property by reason of the existence of a street on the northern side of the property, we are all of the opinion, by reason of the decision of Judge McAlister, that

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there was a breach of the covenant, and therefore, all the costs of this suit and of the arbitrators shall be paid by the Wilkins heirs. The arbitrators state that they consider a fee of \$25 each a reasonable fee, and that the same amount, viz., \$25, should be paid to the referee.

"Signed, JAMES WHITWORTH,
 LEWIS T. BAXTER,
 H. E. JONES, *Referee.*"

Jones, as we have seen, did not view the property with the other arbitrators or alone. The agreement of arbitration, as we have seen, expressly stipulated that the arbitrators should view the premises. This included the third arbitrator as well as the two first selected, for the obvious reason that he should act as much in conformity with the agreement of arbitration as the two first selected. All the arbitrators must act together during the proceedings. Morse on Arbitration, page 152.

The same rule obtains where a third arbitrator is called in. Morse on Arbitration, 158.

An award, to be valid, must strictly conform to the terms of the submission. 3 Baxter, 309; 6 Heis., 162.

Now, Jones says the only question submitted to him was whether or not the value of the lot was diminished or not by the presence of a street known as Lee Avenue. He deciding it was not, and one of the other arbitrators agreeing with him, the award was made. The article of submission provided that should Judge McAlister de-

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cide that the covenants of warranty or warranties were breached, then they should select arbitrators, who should view the premises, and, in accordance with the law as settled by Judge McAlister, determine whether or not said Palmer had been damaged, and, if so, how much. Judge McAlister did decide that there was a breach of the covenant against incumbrances, and fixed the rule for the assessment of damages of Palmer. The arbitrators say in their award that Judge McAlister decides that there was a breach of the covenant against incumbrances, but give Palmer no damages; not even nominal damages. The arbitrators did not pursue the submission to them. They ignored the finding and decision of Judge McAlister in this: the arbitrators found that Palmer sustained no damages; whereas, Judge McAlister decided that, upon the breach of covenant against incumbrances, he was entitled to damages. They also failed to pursue the submission in this, that they ignored Judge McAlister's decision, and considered incidental benefits to the remaining property of complainant resulting from the street in question, instead of considering all the "uses and capabilities of the property," as laid down by Judge McAlister. They also failed to follow the submission, in Jones, one of the arbitrators, not viewing the premises.

The award was properly set aside by the Chancellor. The defendants insist that complainant had acquiesced in the award, and thereby ratified same,

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and also invoking the doctrine of equitable estoppel. The proof nor the acts and doings of complainant sustain this defense.

The proof in the cause shows the damages sustained by complainant, and the report of the Clerk and Master, so far as sustained by the Chancellor, has the weight of the finding of a jury. 1 Pickle, 218-215.

The proof fully sustains the report of the Clerk and Master as confirmed by the Chancellor.

The decree of the Chancellor is correct, and is affirmed with costs.

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CHRISTOPHER v. CHRISTOPHER.

(*Nashville.* March 16, 1893.)

1. HOMESTEAD AND DOWER. *Exceptions to report of assignment untenable, when.*

Where Commissioners for assignment of widow's homestead and dower are agreed upon by all the parties, their report is not subject to exception, upon the ground that the record fails to show that they were not related to the parties.

2. SAME. *Same.*

Exception to Commissioners' report assigning widow's homestead and dower, averring that the Commissioners were not properly sworn, is untenable, where the report recites that they were "qualified," and the proof shows they were in fact sworn by the surveyor.

Code construed: § 3263 (M. & V.); § 2415 (T. & S.).

3. SAME. *Same.*

Commissioners' report assigning widow's homestead and dower, each by separate boundaries, is not subject to exception for failing to state that the homestead so allotted was worth one thousand dollars, the proof showing that it was in fact of the value of one thousand dollars.

4. SAME. *How assigned to widow.*

Where husband occupied a homestead on his lands at and prior to his death, the Commissioners, who assign homestead and dower to his widow, should first assign to her a homestead of the value of one thousand dollars, embracing therein the improvements so occupied by the husband, estimating them at their value, and then they should assign to her, as dower, one-third in value of the remaining lands. The widow must, in such case, take the homestead im-

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provements at their value as part of her homestead, and cannot elect to take them free as part of her dower.

Code construed: §§ 2944, 3250 (M. & V.).

FROM WILLIAMSON.

**Appeal from County Court of Williamson County.
W. O'N. PERKINS, J.**

HEARN & BERRY for Complainant.

J. H. HENDERSON for Respondent.

LEA, J. Martin A. Christopher died in 1891, leaving the petitioner, Susan F. Christopher, his widow, and an only son, the defendant, by a former marriage, his heir. Deceased owned at the time of his death a tract of land upon which he resided, containing about 157 acres. The widow made application to the County Court for homestead and dower to be allotted and assigned her out of said land. Commissioners were appointed at the August term of the Court, but they afterwards declined to act, and at the September term of the Court they were excused and discharged, the widow and son consenting thereto, and the record then recites, "and the parties in interest, viz., Mrs. Susan F. Christopher and W. H. Christopher, assenting thereto, the Court is pleased to appoint as

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Commissioners, to lay off, allot, and set apart homestead and dower to said widow, the following-named freeholders, viz., H. T. Snell, W. H. Crocket, Carter Burk, Lucien Elliot, and W. D. Shelton, any three of whom, together with Matt Murry, County Surveyor, will be authorized and empowered to act in the premises." The County Surveyor, together with four of the Commissioners, met and acted, and made their report to the next term of the Court, setting apart as homestead "fifteen acres, including the mansion and all the outhouses," giving the metes and boundaries of said fifteen acres, and then set apart one-third of the balance of the tract as dower, giving the boundaries thereof. To the report the petitioner filed a number of exceptions, which were overruled by the Court, after proof had been taken, and the report confirmed. Appeal prayed and granted, and assignment of errors practically embodying the exceptions to the report, the more material of which we will notice.

First.—It is objected that the record only shows that the Commissioners were freeholders, and failed to show that they were in nowise related to the parties in interest. It is a sufficient answer to this objection, to state that the Commissioners were appointed by consent of the parties interested.

Second.—It was objected that the Commissioners were not properly sworn. The report recites "after being qualified, and a thorough examination and a careful survey, we have," etc. This is a sufficient statement that they were sworn, and, besides, the

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proof shows that they were sworn by the surveyor, who, under § 3263, M. & V. Code, has the right, and it is made his duty, to swear them.

Third.—It is objected that the report does not state the value of the homestead set apart, and that the same is not worth one thousand dollars. It would have been more regular to have recited in the report the value of the homestead, but this is not fatal; and, besides, the proof, by a decided preponderance, shows both by the Commissioners and other disinterested witnesses, that the homestead set apart was worth one thousand dollars.

Fourth.—The exception most relied on, and earnestly argued, was that the widow had the power to elect where the homestead should be located, and she desired that the mansion house and other improvements be included in the dower, so that the value of the improvements should not be estimated, and that she be permitted to select a homestead outside of the improvements. The Commissioners, in first laying off the homestead, followed the statute, M. & V. Code, §§ 2944 and 3250, which provides, “where a widow is entitled to both homestead and dower out of the same lands, the Commissioners shall set apart the homestead first, and then one-third of the remainder of such lands as dower.” In this case, the widow had no right of election, for her husband, the owner of the land, had made a selection by having his residence and home thereon many years prior to and at the time of his death, and she, as

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widow, was bound by his election. We hold, therefore, that the action of the Commissioners in first setting aside the homestead, including the mansion and adjacent outhouses, to the value of one thousand dollars, and then assigning one-third of the balance of the land as dower, was correct, and the decree of the Court confirming the report is affirmed, and petitioner will pay the cost.

DISSENTING OPINION.

WILKES, J. I cannot concur with the holding of the majority of the Court upon the last point.

The Constitution, Article II., Section 11, provides: "A homestead in the possession of each head of a family, and the improvements thereon, to the value, in all, of one thousand dollars, shall be exempt from sale under legal process during the life of such head of a family, to inure to the benefit of the widow, and shall be exempt during the minority of the children occupying the same," etc.

This constitutional provision was put into effect and operation by the Act of 1870, Second Session, Chapter 80, Sections 1 to 9, in almost the identical language used in the Constitution. Section 3 of this Act prescribes the mode of setting apart homestead under the Act, and directs that three freeholders shall examine the premises, and, on oath,

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set apart said homestead, including the mansion and outhouses, etc.

By the Act of 1879, Chapter 171, this original homestead law was amended so as to read: "A homestead or *real estate* in the possession of or belonging to each head of a family, and the improvements thereon, *if any*, to the value of, in all, one thousand dollars, shall be exempt from execution or attachment or sale under legal process, and each head of a family owning real estate shall have the *right to elect* where the homestead or said exemption shall be set apart, whether living on the same or not."

By Section 2 of said Act, this homestead, that is, such as fixed by the amending Act, shall inure to the benefit of the widow and children, etc.

Section 3 prescribes how the homestead shall be set apart under said Act, and provides that the homestead shall include the mansion and outhouses, if *so desired by the head of a family*. These Acts are found in the compilation by Milliken & Vertrees as §§ 2935, 2936, 2940, 2943, in language but little varying from the Acts compiled.

The Act of 1873, Ch. 98, compiled by Milliken & Vertrees as §§ 2944 and 3250, prescribes the manner in which homestead and dower shall be set apart to a widow, when she is entitled to take both out of the same lands, directing that the homestead shall be first set apart, and then one-third of the remainder of the husband's land shall constitute the dower.

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By § 3247, M. & V. compilation, it is directed that in the dower shall be comprehended (or included) the dwelling-house in which the husband was accustomed, most generally, to dwell next before his death, commonly called the mansion-house, unless the widow agree that it shall not be included, together with the offices, outhouses, buildings, and other improvements thereunto belonging or appertaining.

The value of this mansion or dwelling-house and other improvements shall not be taken into account in assigning dower, but they go to the widow free of any valuation or charge. *Vincent v. Vincent*, 1 Heis., 338; *Puryear v. Puryear*, 5 Bax., 644.

It is the object and policy of the law to give to the widow both homestead and dower whenever it can be done—that is, whenever there is land sufficient to permit the allotment of both. In *Lovelace v. Lovelace*, 1 Legal Rep., 281, it is held that the widow is entitled to take both homestead and dower, and that the right to dower is unaffected by any legislation creating a homestead right. It is further said there is nothing in the provisions of the Constitution, Article II., Section 11, which can be held as qualifying or restricting the widow's right to dower, while the Act of 1873 clearly recognizes the right to both dower and homestead, and prescribes the mode in which both are to be assigned.

I am of opinion that, under the Act of 1879,

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Ch. 171 (M. & V. compilation, § 2936), each head of a family has the right to elect where the homestead shall be set apart, whether living on the same or not.

In *Flatt v. Stadler & Co.*, 16 Lea, 376, it is said, referring to this Act:

"It will appear that the purpose of the Legislature was to give the head of a family the privilege to take as his homestead that which he actually occupied, or, at his election, to take other lands on which he did not live, and the true construction of said section is that the head of the family may elect where the homestead on said exemption shall be set apart upon any real estate he owns. But it is not intended, nor does the language imply, that the homestead or exemption is to be held by any different or more absolute character of title in the one case than in the other." And again it is said: "It seems to us that the amendment designed was to allow the head of the family to locate his exemption upon any part of his real estate, and to relieve him from the necessity of taking it upon the part actually occupied with the improvements."

I cannot agree that the mere occupancy of certain premises and improvements as a home fixes upon such premises and improvements the status and legal character of the homestead which the Constitution secures and the statute provides for each head of a family, but the head of the family has the right to elect to take his homestead out

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of any lands he may own, whether they are being occupied or have been occupied as a residence or mansion or home, which is all that is claimed was done in this case.

It is true the constitutional provision is that the homestead and improvements thereon, to the value of \$1,000, shall be exempt, etc., but the improvements referred to are not necessarily those in which the head of the family is residing, but such improvements as are on that portion of the land which may be selected and allotted; or, in other words, if there are improvements on the lands selected and allotted, they must be taken into account in estimating the value of the homestead thus allotted. Upon this construction the constitutional provision and the Act of 1879 may be made to harmonize, but upon any other the Act of 1879 would be contrary to the constitutional provision. We will suppose that the head of a family, while in prosperous circumstances, has become the owner of 1,000 acres of land, worth \$10 per acre. Upon it he has erected a mansion or residence worth \$5,000. Reverses of fortune come upon him, and his lands are seized under execution. If allowed to do so, he can select 100 acres from his premises, not embracing his residence, which will furnish him a comfortable home in his reduced circumstances. The portion thus selected may have improvements upon it or it may not. If he is compelled to take his homestead at the place of and embracing his residence, then it must follow

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that homestead in kind cannot be allotted to him, because the residence alone exceeds the \$1,000 limit, and hence the entire lands must be sold, and \$1,000 of the proceeds must be invested in other lands, or, it may be, in a portion of the same lands, provided they are bought at such sale, and not allotted in kind.

I am constrained to hold that the head of the family has the right to select his homestead out of any lands he may own, without regard to the place or fact of his residence. This right inures to the benefit of his widow by the plain letter of the law. After the death of her husband, she becomes the head of the family within the meaning of the statutes of exemption. *Bachman v. Crawford*, 3 Hum., 213; *Brien, ex parte*, 2 Tenn. Ch., 33; 41 Geo., 153.

In 15 Lea, 529, case of *Rhea v. Rhea*, it is said: "Since the Act of 1879, the wife may assert her right to homestead in any lands to which the right attaches under the Act," etc. That was a case of a wife deserted by her husband, but certainly the rule would apply with equal force to the widow of a deceased husband.

Now, if the law intends that she shall have both homestead and dower, and that her dower estate shall not be curtailed or affected by her homestead right, then the homestead should be so assigned as not to interfere with the dower or abridge the value of either the homestead or dower.

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The homestead must be assigned first. Now, in order to leave the premises in such condition that she may enjoy the practical benefit of her dower estate, the homestead must be set apart in such lands as lie outside of the mansion-house and premises. Otherwise, her homestead and dower will cover the same premises, or she will fail to get in her dower the mansion-house and improvements, which she is entitled to take without valuation, because it has already been assigned her as homestead at a valuation. Theoretically, she may have homestead and dower embracing the same premises, holding the former in trust for herself and children, and the latter in her own right, but, so far as practical value is concerned, the assignment of the homestead in premises which she is entitled to receive as dower, curtails, to that extent, the value of the dower estate. If, therefore, she cannot take her homestead in lands other than those embracing the mansion or residence, and is compelled to take it in such residence premises, then to the extent of the value of the improvements included in the homestead is her dower estate curtailed and rendered less valuable. Not only so, but she is practically denied both homestead and dower to the full value and extent allowed by law, although there may be sufficient lands to furnish both to the full extent of the law.

I am, therefore, of opinion that the widow has the right to select and have allotted to her homestead in lands other than those which include

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the residence or mansion-house, provided they are owned by the husband at the time of his death, and then, in addition, to have assigned to her the said residence or mansion-house and premises as dower, without valuation of the improvements. I do not mean to hold that the widow may select homestead in any lands which the husband has transferred in his life-time, even though she may not have joined in the conveyance. Her right, as widow, extends only to lands owned by the husband at his death, no other equity appearing.

While it is true the Act of 1870 says the homestead *exempt in the possession* of the husband shall, upon his death, go to his widow, and, under that Act, only a homestead in *actual possession* could pass, yet the Act of 1879 *enlarged* the homestead right of both the *husband and widow* so as to give to *each* the additional right to elect where the homestead shall be assigned. After the passage of that Act, the widow's rights were fixed by it to any lands owned by the husband at his death, and were not confined or limited to a homestead in *possession* of the husband at his death, as provided by the Act of 1870. Since the passage of the Act of 1879, it is the homestead right, as fixed by that Act, which inures to the benefit of the widow, and not simply such right as passed to her under the Act of 1870. *Threat v. Moody*, 3 Pick., 143.

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STATE v. PHOENIX INSURANCE CO.

(Nashville. March 18, 1893.)

1. FOREIGN CORPORATIONS. *State's power to exclude and regulate.*

The State's right and power is undoubted to exclude from its borders foreign corporations engaged in the business of insurance, or to admit them upon any terms, however onerous.

Cases cited and approved: 8 Wall., 168; 10 Wall., 410; 113 U. S., 574; 94 U. S., 535.

2. SAME. *Admission of fire insurance companies.*

Before a foreign fire insurance corporation can lawfully engage in business in this State, it must file copy of its charter in the office of the Secretary of State, and register abstracts thereof in the counties where it proposes to do business, and must, in addition, comply with the requirements of the laws administered through the Bureau of Insurance by the Commissioner of Insurance.

Acts construed: Acts 1877, Ch. 31; Acts 1891, Ch. 122 and Ch. 47.

3. SAME. *Liable for charter tax and fees.*

And such company is liable for the charter tax imposed for the privilege of filing its charter, and for the fees allowed for such filing, and for registration of abstracts of its charter.

Acts construed: Acts 1891, Ch. 25 (Ex. Sess.).

4. STATUTES. *Rule of construction.*

Except in a very clear case, that which is within the letter of a statute will not be excluded from its operation as not being within its spirit.

Cases cited and approved: State v. Turnpike Co., 2 Sneed, 90; 4 Wheat., 202-3.

FROM DAVIDSON.

Appeal in error from Circuit Court of Davidson County. W. K. McALISTER, J.

State *v.* Phoenix Insurance Co.

Attorney-general PICKLE for State.

VERTREES & VERTREES and P. D. MADDIN for Insurance Company.

WILKES, J. This cause was tried in the Circuit Court of Davidson County, before Hon. W. K. McAlister, Judge, upon an agreed statement of facts. Judgment was rendered against the State, from which it appealed, and, through the Attorney-general, has assigned errors.

The Judge in the Court below delivered a written opinion, in which the facts are set out at length. The conclusions of the trial Judge are stated, and the reasons upon which these conclusions are based are given with the force and clearness usual with that learned Judge.

The opinion is as follows:

"This case is submitted to the Court upon an agreed statement of facts, and the purpose of the litigation is to test the liability of foreign fire insurance companies to the payment of certain privilege taxes and official fees. The following facts appear in the printed stipulation of counsel, to wit:

"That defendant is a fire insurance company, chartered by, and organized under, the laws of New York, with its chief office and place of business in Brooklyn, in said State. Said company is engaged in transacting a fire insurance business in this State, and has local agents employed in twelve counties of the State. During the years in which

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the defendant company has been engaged in its business in Tennessee, it has complied with all the laws of the State governing, or relating to, fire insurance companies. It has filed a copy of its charter, and a power of attorney to acknowledge service of process, with the Treasurer of the State, in accordance with the Insurance Act passed by the Legislature of 1891. It has also obtained from the Treasurer of the State the certificate or authority to do business, and has obtained license from him for its local agents, and has caused certified copies thereof to be deposited with the County Court Clerk of the counties in which it does business, as the laws require.

"It has in all respects complied with the laws of Tennessee as administered by the Bureau of Insurance.

"There are *eighty-five* foreign insurance companies doing business in the State, and the aggregate amount of taxes and fees paid by them during the year 1891 to the State and to the Commissioner of Insurance was \$48,065.77. The defendant company paid of this amount, in taxes and fees, during said year, the sum of \$618.25.

"Now, in addition to doing all these things, it is insisted, on behalf of the State, that under the provisions of the Act of March 26, 1891, and Section 8 of the Revenue Act of the Extra Session of 1891, the defendant is required to file a copy of its charter with the Secretary of State, and to cause an abstract thereof to be recorded in the

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Register's office of every county in which it transacts business, and to pay to the State a privilege tax of ten dollars, and to the County Register and Secretary of State a fee of three dollars each for filing and recording its charter.

"The questions submitted for the determination of the Court are, viz.:

"*First.*—Whether or not the defendant is liable for the payment of a privilege tax of ten dollars, which the State claims by virtue of the Act, which is Chapter 25 of the Extra Session of 1891.

"*Second.*—Whether or not the defendant, a foreign fire insurance company, which has complied with the laws administered and executed by the Bureau of Insurance, and filed a copy of its charter with the Commissioner of Insurance for 1891-2, is also obliged or required to file a copy thereof with the Secretary of State.

"*Third.*—Whether the defendant, having caused the license issued to its agents by the Commissioner of Insurance to be filed with the County Clerks of the respective counties, is also obliged or required to cause an abstract of its charter to be recorded in every county in which its agents do business.

"*Fourth.*—Whether the said tax and fees demanded by the Secretary of State are required by law to be paid.

"The settlement of these questions depends upon a proper construction of the Acts of Assembly out of which the present controversy has arisen. The

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Act upon which the State relies in support of the position that the charters of foreign fire insurance companies are required to be filed in the office of the Secretary of State, is found in Chapter 122 of the Acts of 1891, which is entitled 'An Act to amend Chapter 31 of the Acts of 1877,' declaring the terms on which foreign corporations, organized for mining or manufacturing purposes, may carry on their business, etc., so as to make the provisions of said Act apply to all foreign corporations that may desire to own property or do business in the State. The second section of the Act of 1891 provides, viz.: That each and every corporation, created or organized by or under any government other than that of this State, for any purpose whatever, desiring to own property or carry on business of any kind or character in this State, shall first file in the office of the Secretary of State a copy of its charter, and cause an abstract of same to be recorded in each county in which such corporation desires or proposes to carry on its business, etc., as now required by Section 2 of Chapter 31 of Acts of 1877. It is conceded by counsel for defendant that this language is broad enough to sustain the contention of the Secretary of State, and to include foreign fire insurance companies, if nothing is to be considered but the language of this Act. It provides in terms that the Act of 1877, Chapter 31, shall be so 'amended and enlarged' as that its provisions shall apply to all foreign corporations, and Section 2 is

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expressly applied to all foreign corporations desiring to own property or carry on business of *any kind or character* in this State. The argument on behalf of defendant is, that foreign fire insurance companies, although within the *letter* of the statute, are yet not within the statute, because not within its spirit nor within the intention of its makers. There are cases which require us to disregard the letter of a statute when they are manifestly not comprehended within its spirit nor within the intention of its framers. A forcible illustration of this rule is found in the case of *Rector, etc., of Holy Trinity Church v. United States*, recently decided by the Supreme Court of the United States. (143 U. S., 457.) That case was a criminal prosecution, based upon what is known as the alien contract labor law, which prohibited the importation of *any* foreigner under contract to perform labor or service of *any kind*. The plaintiff in error was a religious society, incorporated under the laws of New York, and, after the passage of said Act, employed E. Walpole Warren, an alien residing in England, as the pastor and rector of such church, who, thereupon, removed to the United States and entered upon such service. The Circuit Court held that the contract was within the prohibition of the statute, and rendered judgment against the church for a heavy penalty. On appeal to the United States Supreme Court, the case was reversed in an opinion by Judge Brewer, who said:

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"It must be conceded that the act of the corporation is within the letter of this statute, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words 'labor' and 'service' both used, but also, as if to guard against any narrow interpretation, and emphasize a breadth of meaning, to them is added 'of any kind;' and, further, the fifth section of the Act makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants, which strengthens the idea that every other kind of labor or service was intended to be reached by the first section. It is a familiar rule that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers. This is not the substitution of the will of the Judge for that of the legislator, for frequently words of general meaning are used in a statute—words broad enough to include an act in question—and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.' As said in *Stradling v. Morgan*, Plowden, 205:

"From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and

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those statutes which comprehended all things in the letter, they have expounded to extend to but some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter, they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity for making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances.'

"In the case of the *United States v. Kirby*, 7 Wall., 482, the Court said :

"'All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter.'

"With these principles in view, the question for decision is whether foreign fire insurance companies were intended to be included in the provisions of the Act of March 26, 1891. On the fourth of March, 1891, *the same* Legislature which passed the Act which, it is claimed, imposed these additional burdens upon foreign fire insurance companies, also enacted a law compiling into one Act all the

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existing laws regulating the business of fire insurance. It requires all fire insurance companies to file with the Treasurer of the State certified copies of their charters. It also prescribes that local agents of said company, before transacting any business in any county of this State, shall procure a license from the Treasurer of the State, and that certified copies of the same shall be filed with the Clerk of the County Court. It also requires that all foreign fire insurance companies shall file with the Treasurer of the State a power of attorney, authorizing said officer to acknowledge service of process from any court of record in the State in a suit against said company. Said act also provides that for the privilege of doing business in the State, foreign fire insurance companies shall pay into the State Treasury the sum of \$2.50 upon each \$100 of premiums, which shall be in lieu of *all* other taxes. As already observed, this Act was passed on the fourth of March, 1891. On the twenty-sixth of March, 1891, the general law was passed which, it is claimed, also embraces foreign fire insurance companies, although no mention of such corporations is made in the Act. This latter Act purports to extend the provisions of an Act passed in 1877 to all foreign corporations. The Act of 1877 thus sought to be enlarged and extended, was entitled, 'An Act to declare the terms on which foreign corporations, organized for mining or manufacturing purposes, may carry on their business, and purchase, hold, and convey real

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and personal property in this State.' It provided that copies of the charters or acts of incorporation of such foreign mining or manufacturing companies should be filed in the office of the Secretary of State, and abstracts thereof should be recorded in the Register's office of every county in which it proposed to do business or own property. The Act recited that its chief object was to secure the opening and development of the mineral resources of the State, and to facilitate the introduction of foreign capital. It provided that home creditors shall have preference over foreign general creditors in the distribution or subjection of assets. It provided, also, that mining corporations and corporations mining metals might build railroads, canals, and telegraph lines. It provided, also, that any corporation coming under the Act, might establish towns and villages. Could any thing be more unreasonable than the idea that the Legislature of 1891, having just enacted a comprehensive compilation of the fire insurance laws of the State, providing, in detail, for the regulation of the whole business, should, in three weeks thereafter, enact another law, and invest foreign *fire* insurance companies with all the incongruous powers and functions that belonged to a foreign mining and manufacturing corporation under the Act of 1877? And all this is to be inferred from general words employed in the statute, for there is not the slightest reference to *insurance* companies to be found anywhere in the Act.

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"Again, it is to be presumed that if the Legislature intended to embrace foreign fire companies in the provisions of the Act March 26, 1891, it must have had some useful purpose in view. If the object was to require the charter to be filed in public offices, so as to be accessible to all, that duty was already imposed upon said companies by the Act of March 4, 1891, which required copies of their charters to be filed with the Treasurer of the State, who is *ex officio* Commissioner of Insurance. The provision with reference to service of process upon such companies is neither so stringent nor efficacious as that contained in the Act of March 4, 1891. It is true the insurance law does not require that an abstract of its charter be filed in every county in which the company offers to do business, but it does require that its local agents shall obtain a license from the State Treasurer, which shall be recorded in every county in which business is transacted. If it be conceded that a useful public purpose would be subserved in requiring an abstract of the charter to be recorded with the County Court Clerk, as provided by the Act of March 26, 1891, that provision could not be enforced, unless the whole act is applicable to foreign fire companies. The language of counsel, which is found in their printed brief, the Court thinks very apposite:

"If the Act of March 26 relates to foreign fire companies, it is useless, oppressive, and absurd. It is useless, because provisions covering the same

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ground (substantially) already existed; it is absurd, because the existing provisions are more effective, and the powers which said Act confers, if exercised by an insurance company, would be ridiculous; and it is oppressive, because it imposes a heavy tax on the companies to attain an end which the companies were already taxed to attain, and which is attained by the older system, and under the first tax, in a much better way.'

"If, then, the extension of the Act of March 26 to foreign fire insurance companies is useless, oppressive, and absurd, the construction invoked cannot be accepted as correct. It is the duty of the Court in such a case to say that, however broad the language of the statute may be, the defendant company, although within the *letter* of the Act, is not within the *intention* of the Legislature, and, therefore, cannot be within the statute.

"As to the tax imposed by Section 8 of Chapter 25 of the Acts of the Extra Session of 1891, it is plain that tax is restricted to *domestic* corporations, and has no application to foreign corporations. Judgment will be entered in favor of defendant on all the issues, and the State will pay the costs."

There can be no doubt of the right of the State to exclude all foreign fire insurance companies from its borders if it see proper so to do, or to admit them upon such terms as it may choose, however onerous. *Paul v. Virginia*, 8 Wall., 168; *Ducat v. Chicago*, 10 Wall., 410; *Chicago, etc., Ins.*

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Co. v. Needles, 113 U. S., 574; *Doyle v. Cent. Ins. Co.*, 94 U. S., 535.

With the question of good policy involved in their admission, this Court can have nothing to do. That is a matter wholly for the Legislature to determine.

The simple question with which we are confronted is: Does Chapter 122 of Acts of 1891 embrace foreign fire insurance companies, and require their charters to be registered in the office of the Secretary of State, and abstracts thereof in the several counties where they do business, as is by that Act required of all other classes of foreign corporations?

The language of the Act leaves no room for doubt or construction.

The first section applies to all foreign corporations organized for any purpose whatever that may desire to do any kind of business in this State. The second section applies to each and every foreign corporation "organized" for any purpose whatever, and requires of them registration of charters and abstracts. The third section makes it unlawful for any foreign corporation to do or attempt to do any business, etc. The fourth section makes a corporation complying with the Act, to all intents and purposes, a domestic corporation; and the fifth section subjects their property to attachment.

The chief purpose of the Act was not to confer new privileges, but to impose restrictions upon foreign corporations.

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It is true that, because of the adoption of Chapter 31 of the Acts of 1877, some very extraordinary privileges may have been conferred upon foreign corporations, and some privileges that domestic corporations of the same classes do not possess—privileges that foreign fire insurance companies cannot avail themselves of conveniently; but this is not a sufficient reason why foreign fire insurance companies should not be subjected to the restrictions of the Act.

The Act of 1891, Chapter 47, regulates domestic as well as foreign fire insurance companies, and prescribes the terms upon which each may do business in the State, and requires each to file with the Insurance Commissioner a certified copy of its charter. Chapter 122 prescribes the terms upon which a foreign corporation can be admitted into the State, while Chapter 47 prescribes the terms upon which an insurance company may do business that has already been admitted into the State. Domestic fire insurance companies must obtain their charters from the Secretary of State, and have them registered in that office, for which they must pay a fee. Not only so, but a copy of their charter must be filed in the office of the Insurance Commissioner. The requirement that a copy of the charter of each foreign fire insurance company shall be registered in each county where it proposes to do business, may have been, and doubtless was, considered by the Legislature a precaution to enable policy-holders to more conven-

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iently and intelligently determine whether such company was so constituted and organized as to merit confidence and trust. These foreign fire insurance companies transact more business than any other class of corporations, and need to be more carefully regulated and guarded. They virtually become domestic corporations, so far as to be subject to a privilege-tax like domestic corporations, by the plain provisions of the law to that effect, but with some additional privileges under the Act of 1877, which domestic corporations do not enjoy.

There is not necessarily any want of harmony in the two Acts, when properly construed, the one regulating the terms and prescribing the conditions on which all foreign insurance companies shall be admitted into the State, and the other prescribing the terms on which they may do business after they are admitted.

The position assumed that extraordinary and incongruous powers are conferred by the adoption of the Act of 1877, such as to build railroads, bridges, telegraph lines, etc., is not sustained by a proper analysis of the two Acts. The Act of 1877 provides for two classes of corporations—mining, and manufacturing. The sixth section of that Act gave the powers enumerated only to corporations engaged in mining, and such as were engaged in manufacturing metal. It does not, therefore, follow that these powers have been conferred on insurance companies by the laws we are now construing, as they were not even conferred on all the corporations

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authorized to do business under the Act of 1877. As to the provision of the eighth section, that any corporation having and obtaining the privileges of this Act may establish towns, villages, and settlements for the use of its employes and others, it is sufficient to say that, conceding this power to be now conferred upon foreign fire insurance companies, there is no valid objection to it. The Legislature had authority to confer it, and if it becomes necessary for use of employes and others that such companies should build towns, villages, or settlements, it certainly could not be hurtful to the public, nor improper, to allow it to be done, and the conferring of such power would not vitiate the Act.

The companies are not compelled to use the authority, but if their employes should become so numerous, and their means so abundant, as to justify its exercise, then they have the necessary permission to do so, and no reason is apparent that such power is in any way prejudicial to the public.

But if we were to assume that these extraordinary powers were given which ought not in good policy to have been conferred, it would not be such an absurdity as would compel the Courts to exclude from the operation of the law corporations which are clearly embraced in its terms.

Chief Justice Marshall, in *Sturgis v. Crowninshield*, 4 Wheat., 202-3, said: "The spirit prevails over the plain letter of the statute only in cases in which the absurdity and injustice of applying the

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provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."

See also *State v. Turnpike Co.*, 2 Sneed, 90.

While we do not mean to adopt the language of Chief Justice Marshall as our opinion in this case, still it is an expression showing the great care and hesitancy that should be exercised in passing upon an Act of the Legislature, and pronouncing the same useless and oppressive.

As to the tax imposed by Section 8 of Chapter 25 of the Acts of the Extra Session of 1891, it remains that if foreign corporations are, by the provisions of the Act and compliance therewith, put on the footing of domestic corporations, and for exercise of like privilege treated as such, they must pay the tax in controversy in this case on such domestic corporations. This tax is levied upon all corporations.

The judgment of the Court below will be reversed, and judgment will be entered against the defendant company for tax of \$10 and the fees of the Secretary of State, \$6, and all costs, for which execution may issue.

Lurton, C. J., dissents.

Bank Cases.

CITIZENS' BANK *v.* KENDRICK, PETTUS & CO.

AND

DORITY *v.* FRANKLIN BANK.

(Nashville. March 23, 1893.)

1. MARSHALING ASSETS. *Under general assignments.*

When maker and indorser of note become insolvent, and each makes a general assignment for benefit of his creditors, the holder of the note is entitled to *pro rata* under each assignment upon the full amount of the note, if the aggregate sum thus realized does not exceed his debt.

Cases cited and approved: 78 Ky., 291; 79 N. C., 244; 67 Mich., 296; 82 Penn. St., 113 (S. C., 22 Am. R., 754); 78 Wis., 615 (S. C., 23 Am. St. R., 435); 6 Cush., 537; 85 N. C., 352 (S. C., 39 Am. R., 702).

2. EQUITABLE SET-OFF. *Indorser for insolvent principal may retain, when.*

An indorser whose principal has become insolvent, may, without having paid the note, retain for his indemnity any funds belonging to his principal that may be in his hands.

Cases cited and approved: Nashville Trust Co. *v.* Bank, 91 Tenn., 336; 1 Paige Ch., 585 (S. C., 19 Am. Dec., 452).

FROM MONTGOMERY.

Appeal from Chancery Court of Montgomery County. GEO. E. SEAY, Ch.

HOUSE & MERRITT for Citizens' Bank.

Bank Cases.

R. H. BURNETT for Kendrick, Pettus & Co.

LEEDS & SAVAGE for Franklin Bank.

W. M. DANIEL, T. J. BAILEY, A. E. GARNER, and Jno. L. STARK for creditors of Kendrick, Pettus & Co.

CALDWELL, J. On December 10, 1890, Kendrick, Pettus & Co. made a general assignment for the benefit of creditors. The indebtedness aggregated about \$250,000, and the assets were worth about one-fourth that amount.

On the same day, a few hours later, Franklin Bank also made a general assignment for the benefit of creditors. Its liabilities were over \$900,000, and assets about one-fourth as much.

These bills were filed for the settlement of the two trusts.

Without going much into detail, the legal questions presented on appeal will be considered in order.

First.—Franklin Bank was bound as indorser on the paper of Kendrick, Pettus & Co. to the amount of about \$75,000; and that paper was secured in both assignments alike, and in common with other debts of the assignors respectively.

Each holder of the separate pieces of paper making up that \$75,000 claimed the right to prove his debt *in full* against both debtors, and to receive from each fund a full *pro rata* of his whole debt.

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Franklin Bank and its assignees denied that right in the full sense claimed, and contended that the holders of such indorsed paper should first credit their debts by *pro rata* of the fund provided by the principal debtor, and then receive *pro rata* on *balance only* from the fund of the indorser.

The Chancellor was right in sustaining the former contention.

Kendrick, Pettus & Co, the maker of the indorsed paper, secured that paper as it did its other liabilities, giving preference to none. Franklin Bank, the indorser, did the same. That paper, as it then existed, and to its full amount, was provided for in both conveyances; in each as if the other had not been made. Two securities were provided for the holders of that paper, while only one was provided for the other creditors of the respective assignors. Each assignment made equal provision for each beneficiary therein named, without reference to any other security that he might have.

Two trust funds were created, and those entitled to participate in the one or the other were named and placed upon an equal footing. It was not provided, nor contemplated, that any beneficiary of the one fund should receive a greater or less *per centum* of his whole debt from that fund than any other beneficiary thereof should receive. Those who were creditors of both assignors became entitled to share in both funds; having two debtors, they received two securities, one of which they

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are to share equally with the other creditors of the debtor providing it, and the other of which they are to share equally with the other creditors of the debtor providing it.

In such cases, each trust should be administered separately, and such fund distributed as if the other had not been created, at least up to the point of making full payment of debts entitled to participate in both. Less than that would be unjust to those having two debtors and two securities.

In the present case the most that such creditors can hope for is one-half of their debts—one-fourth under each assignment—while others will receive just half as much on the dollar.

It seems to be well settled that if both maker and indorser of negotiable paper become insolvent, and voluntarily assign their property for the benefit of creditors, as in this case, the holder may prove the full amount of his debt against both estates at the same time, and receive from each a full *pro rata* on that amount, provided only that the two sums so received shall in no case exceed the true amount of the debt. Such is the rule in Kentucky, North Carolina, Michigan, Pennsylvania, Wisconsin, and Massachusetts. *Citizens' Bank v. Patterson*, 78 Ky., 291; *Brown v. Merchants' Bank*, 79 N. C., 244; *National Bank v. Byles*, 67 Mich., 296; *Miller's Estate*, 82 Penn. St., 113 (S. C., 22 Am. R., 754); *In re Meyer*, 78 Wis., 615 (S. C., 23 Am. St. R., 435); *Sohier v. Loring*, 6 Cushing, 537.

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We have been able to find no case holding the contrary upon the precise facts stated. The case of *Bank v. Alexander*, 85 N. C., 352 (S. C., 39 Am. R., 702) is not in conflict. It recognizes the authority of *Brown v. Merchants' Bank*, *supra*, and makes a distinction between the two cases upon their different facts.

The English rule is stated by Mr. Byles as follows: "When accommodation bills are in the hands of a third party, for a valuable consideration, he may prove the whole of each bill upon each of the parties to it, and receive dividends as far as the amount due to him." Byles on Bills, 370.

Second.—At the time the assignments were made Kendrick, Pettus & Co. had \$32,000 on deposit in the Franklin bank. In its answer and cross-bill, the bank insisted that it was entitled to retain that deposit as indemnity against what it might have to pay as indorser for Kendrick, Pettus & Co. on the \$75,000 of commercial paper.

That right was denied by the assignee of Kendrick, Pettus & Co., upon the ground, mainly, that the liability of the bank as indorser had not been ripened into a debt by payment of the paper indorsed.

We think the bank clearly entitled to the indemnity, though it has not, in fact, paid any part of the indorsed paper, so as to become a creditor of the maker in the full sense. Payment is not a prerequisite to the relief sought. Liability to

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pay and insolvency of the principal debtor, are sufficient. That, without more, justifies an equitable set-off.

The bank must pay as far as its assets will go—that is inevitable. In fact, it has conveyed its property for that purpose, and can be protected against certain and irretrievable loss in no other way than that proposed in this case, its principal being hopelessly insolvent, and having assigned all of its property for the benefit of general creditors.

An indorser for an insolvent maker, being indebted to that maker by reason of a deposit, or otherwise, may bring the holder of the paper indorsed and the maker before a court of equity, and have the indorser's debt to the maker applied on the debt of the holder.

That is practically what the bank has done in this case.

The fact that the firm of Kendrick, Pettus & Co. assigned its property for the benefit of all its creditors, and that the holders of the paper indorsed by the bank constitute but a small part of those creditors, does not defeat or impair the bank's right to indemnity from the fund in question. In equity, that fund was, at most, an asset of Kendrick, Pettus & Co. *only* to the extent of any balance thereof that might remain after adjustment of the equities existing between Kendrick, Pettus & Co. and the bank. Being insolvent, the depositor had no power to transfer its claim for the deposit, so as to defeat the bank's right of

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retention for indemnity. Hence, all that passed by the assignment of the depositor, as against the bank, was what may be left of the \$32,000 after the bank shall have been fully re-imbursed for all payments made by it on the depositor's paper.

It would be unjust and inequitable in a high degree to compel an indorser, so situated, to surrender assets of an insolvent principal before settlement of all liability growing out of the indorsement.

It is worthy of repetition, that the right of equitable set-off existing in favor of the bank by reason of the insolvency of Kendrick, Pettus & Co., was not affected by the latter's assignment of all its assets.

This proposition has unquestioned support in sound reason and justice, and is sustained by authorities directly in point. See *In Re Receiver*, 1 Paige Ch., 585 (S. C., 19 Am. Dec., 452); 1 Morse on B. & B. (3d Ed.), Sec. 337.

Our own case of *Nashville Trust Co. v. Bank*, 91 Tenn., 336, maintains the same doctrine, though involving different facts.

The decree on this point will be modified accordingly.

Bobo v. People's National Bank.

BOBO v. PEOPLE'S NATIONAL BANK.

(Nashville. March 23, 1893.)

1. NATIONAL BANKS. *Suit against for usury, barred when.*

Where a national bank discounts a note and retains usurious interest out of its proceeds, a suit to recover the usury must, under the Federal statute, be brought within two years after the date of actual receipt of the usury by the bank. The "usurious transaction occurred," within the meaning of the Federal statute, at the time the bank retained the usurious interest, and not at the time when the discounted note fell due or judgment was rendered thereon.

Statute construed: U. S. Rev. Stat., § 5198.

Cases cited and approved: 46 Am. R., 526; 22 Ohio, 525; 40 Ohio, 629; 13 N. W. R., 63.

2. SAME. *Liability for taking usury.*

Double the excess over the legal rate, not double the entire interest collected, is the measure of a national bank's liability under the Federal statutes for knowingly collecting usurious interest.

Statute construed: U. S. Rev. Stat., § 5198.

Cases cited and approved: 64 N. Y., 212; 72 Penn. St., 209; 104 U. S., 271.

FROM BEDFORD.

Appeal from Chancery Court of Bedford County.
W. S. BEARDEN, Ch.

J. H. HOLMAN for Bobo.

E. CALDWELL, IVIE & IVIE, and SMITH & DICKINSON for Bank.

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WILKES, J. Among other questions presented in this cause, is the proper construction of Sections 5197 and 5198 of the Revised Statutes of the United States relating to national banking associations.

These sections are as follows:

"5197. Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, territory, or district where the bank is located, and no more, except when, by the laws of any State, a different rate is limited for banks of issue, organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. When no rate is fixed by the laws of the State or territory or district, the bank may take, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the purchase, discount, or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight-drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

"5198. The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which

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the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred.

"That suits, actions, and proceedings against any association under this title may be had in any Circuit, District, or territorial Court of the United States held within the district in which such association may be established, or in any State, county, or municipal Court in the county or city in which said association is located, having jurisdiction in similar cases."

On the eighth of November, 1887, Hutson & Bobo, partners, discounted in the People's National Bank of Shelbyville, their note for \$5,000, the bank retaining and reserving \$170.85 as discount upon the same.

On December 5, 1887, they discounted in said bank another note for \$3,000, the bank retaining and reserving \$102.40 as discount upon it.

This bill was filed in the Chancery Court of Bedford County, March 3, 1890, to recover one-half of double the amount of the discount reserved by the bank, upon the ground that the interest or discount reserved was at a rate greater

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than allowed by the laws of Tennessee. Hutson, one of the firm, joins in the suit to enable his partner, Bobo, to work out his rights, but declines for himself to receive or demand any relief, and hence the contention is for the one-half to which it is claimed Bobo is entitled under the statute. It is conceded that the rate of interest or discount reserved was greater than allowed by the laws of Tennessee, and was taken knowingly. It is insisted that the action, as to these items, is barred by the limitation of two years provided in the statute; and that, even as to items reserved afterwards, and within two years, the recovery could be only for double the *excess* of interest reserved over the legal rate, and not for double the *entire* interest reserved.

The Chancellor found against the bank on both these contentions. There are other matters of controversy in the case, but it is not necessary to notice them in this written opinion.

The transactions in these cases are what are known in banking circles as discounts. Discounting notes consists in advancing money upon them, deducting the interest, and receiving, retaining, or reserving the same in advance—that is to say, the notes are made for certain amounts, running a certain time to maturity; the interest or discount is deducted at the time the notes are made from their face, and the net proceeds only are placed to the credit of the borrower.

Under this hypothesis, it is contended that the

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interest was reserved and paid at the dates when the notes were discounted; that the "usurious transaction" then occurred, and the statute of limitations then began to run.

The language of the statute is, "the action must be brought within two years from the time the 'usurious transaction' occurred."

The question then is presented, When does the "usurious transaction" occur in the case of discounted paper? Is it when the discount is made and the interest is reserved out of the proceeds, or is it when the debts then contracted are paid off and discharged, or final judgment rendered thereon? The authorities upon the question are conflicting.

In the case of *Duncan v. The First National Bank*, 11 Bankers' Magazine, 787 (also reported in First National Bank cases, page 360), it is held that the limitation does not begin to run until the principal has been paid or judgment entered for the full amount thereof. The reason assigned for this holding is that it cannot be ascertained, before payment or judgment, whether the interest is usurious or not, as it may have been intended to apply the excess over the legal rate, not as interest, but to the reduction of the principal.

In case of discounted paper, the usury being reserved in advance and retained as interest, this reason will not apply, as the purpose of retaining the excess as interest has not only been mani-

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fested, but has already been carried into practical effect.

On the other hand, in the case of *Lynch v. Merchants' National Bank*, 46 Am. Rep., 526, it is said: "The two years' limitation begins to run the instant the usurious interest is paid, without regard to the payment of the principal."

To the same effect is the case of *Shinkle v. The First National Bank*, 22 Ohio, 525.

In the case of *Monongahela National Bank v. Ourholt*, 96 Penn., 329, it is said: "Upon actual payment by the borrower, and receipt of illegal interest by the lender, the right of action accrues, and can be maintained, whether the debt has been paid or not. See also *National Bank v. Trimble*, 40 Ohio, 629; *Kinser v. Farmers' National Bank*, 13 N. W. Rep., 63.

We are of opinion that the suit in this case, not having been brought within two years from the dates when the notes were discounted, and the usurious interest reserved, the action as to the items so reserved upon the original discounts, is barred by the limitation of two years fixed by the statute.

As to items of interest or discount collected or reserved upon the notes when renewed within the two years, the limitation does not apply, and the action is not barred.

The Chancellor held the contrary of the first proposition, and as to this his decision is reversed, and the two items mentioned will be stricken out.

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Again, the contention is that, under the statute, judgment can only be taken for double the excess of interest, and not double the entire interest reserved or paid. Upon this question also the authorities are not agreed.

In the case of *Hinterminster v. The First National Bank*, 64 New York Court of Appeals, 212, the action was to recover twice the amount of interest paid, but the Court limited the recovery to twice the excess over the legal rate, saying it would be disposed to hold to the contrary but for recent decisions of the United States Courts, but the decisions in point are not cited.

The same principle was held in *Brown v. Second National Bank of Erie*, 72 Penn. St., 209.

In the case of *The First National Bank v. Johnson*, 104 U. S., 271, in the opinion of the Court appears the following statement:

"Upon these facts, judgment was rendered against the defendant below for \$5,470.72; twice the amount of the interest in excess of seven per centum per annum, to reverse which this writ of error is prosecuted. The decree of the Court below was affirmed, but the question now under consideration, though necessarily passed upon, was not argued nor discussed in the opinion, and it seems to have been conceded by counsel and by the Court that the proper measure of damages had been given.

We are of opinion that, upon a fair construction of the language of the statute, the proper

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measure of recovery is twice the excess of interest reserved or paid over and above legal interest, and not twice the amount of the entire interest, as held by the Chancellor; and, upon that holding, his decision is reversed.

The cause will be remanded to the Court below to determine the amount of the usury, and for proper judgment, according to this opinion. The costs of the appeal will be paid by appellee, and the costs of the Court below will be equally divided.

Other questions presented in the record are not necessary to be written upon.

Howard & Co. v. Walker.

HOWARD & CO. v. WALKER.

(Nashville. March 23, 1893.)

1. BANKS AND BANKING. *What constitutes payment of draft.*

As between holder and drawee, a draft must be held to have been paid or satisfied upon these facts, to wit: Walker having draft on Howard & Co. indorsed and deposited it with bank A. Promptly bank A forwarded it to bank B, its regular correspondent, indorsed "for collection." Bank B presented it to Howard & Co., and, by their direction, to bank C, for payment. Bank C, having ample funds of Howard & Co., listed said draft, but without paying any cash thereon, and canceled and delivered it up to Howard & Co., taking credit therefor upon settlement with them. In settlement, made in accordance with banking customs, between banks B and C, this draft was embraced, there being a large balance on that settlement in favor of bank B, which was not paid, but placed to that bank's credit. Bank B credited bank A with amount of this draft, though no money passed. In this situation banks B and C became insolvent—bank C being largely indebted to bank B.

2. SAME. *Customs in transaction of business.*

The Courts recognize and enforce, and the public and individuals must, at their peril, take notice of the reasonable and lawful customs adopted for the transaction of commercial business.

Cases cited and approved: Sahlien v. Bank, 90 Tenn., 221; Bank v. McClung, 7 Lea, 492; 1 Pet., 25; 11 Wheat., 431; 11 N. Y., 213; 89 N. Y., 182.

FROM MAURY.

Appeal in error from Circuit Court of Maury County. E. D. PATTERSON, J.

Howard & Co. v. Walker.

HUGHES & HATCHER for Howard.

GEO. C. TAYLOR for Walker.

SNODGRASS, J. The plaintiff in error was defendant below in a suit brought by Walker before a Justice of the Peace for \$140, the price of a mule. He obtained judgment before the Justice, and on appeal in the Circuit Court, for the amount claimed; and Howard & Co. appealed in error.

The facts were agreed upon, and are as follows:

Howard & Co. authorized W. T. Boyd to buy mules for them in October, 1891, and to pay for such mules by drafts drawn on them. On October 5, 1891, Boyd bought a mule for them from Walker, and gave him a draft on Howard & Co. for its price, \$140. Walker indorsed the draft, and deposited it in the First National Bank of Centerville, Tennessee, on same day, and this bank immediately forwarded it to its regular correspondent at Columbia, the Columbia Banking Company, indorsed "for collection." The Columbia Banking Company received the draft on the seventh, and on the eighth of October presented the draft to Mr. Howard, of the firm of Howard & Co., who directed that it be taken to the Bank of Columbia for payment. On the thirteenth of October the Columbia Banking Company presented the draft to the Bank of Columbia, where directed, and where Howard & Co. had funds more than

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sufficient to pay it. The bank took the draft and charged it to account of Howard & Co., canceled it, and delivered it afterwards to them upon making up their pass-book, leaving still a balance to the credit of Howard & Co. in the Bank of Columbia. No money was actually paid out, but in the settlement between these banks on that day (which was the usual daily settlement according to the custom of these banks), the Bank of Columbia held checks and drafts against the Columbia Banking Company to the amount of \$2,000 in excess of drafts and checks held by the Columbia Banking Company against the Bank of Columbia; and it therefore charged up, according to the custom of these banks, and, as it is agreed, of all banks, this excess of \$2,000 to the Columbia Banking Company, which gave a corresponding credit to the Bank of Columbia.

The Columbia Banking Company never remitted to the Bank of Centerville, and that bank never received any thing, on the draft or otherwise, through this collection. Both the Bank of Columbia and the Columbia Banking Company failed on the seventeenth of October. They were both insolvent from the fifth to the seventeenth, but their officers did not know it until October 17, and there is no pretense of bad faith in their transactions with each other. They were according to the usual daily course of business between them.

When the settlement of the thirteenth of October referred to took place, in which the draft now in

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controversy was included, the Columbia Banking Company gave credit to the First National Bank of Centerville for amount of the draft, but, as before stated, never actually remitted or otherwise paid it to that bank or plaintiff.

When the Columbia Banking Company and the Bank of Columbia suspended business on the seventeenth, the former was indebted to the latter several thousand dollars.

Upon these facts, with some others not material to be stated, the Circuit Judge held the draft had not been paid; that the transaction in which it was settled was not a collection, and was not binding on plaintiff; and that Howard & Co. were still liable to him for the original debt.

In this we hold there was manifest error.

The collection was, according to bank custom, as effectual as though the money had been handed over the counter by each bank to the other in satisfaction of this as of the several other checks involved. It makes no difference, and makes it none the less a payment, that the indorsement by the Centerville bank was restrictive "for collection." It was expected that such draft would be collected in the usual way, and it is agreed that it was done according to custom of these and all banks in daily transactions with each other, in which checks are not paid alternately back and forth, but settlement made upon the basis indicated. This is the general custom, and is a reasonable one, and parties dealing with the banks adopting are bound

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by it. 1 Morse on Banks, Sec. 9, pp. 23, 29, and notes (3d Ed.); *Mills v. Bank*, 11 Wheat., 431; *Bank v. Triplett*, 1 Peters, 25; *Sahlien v. Bank*, 6 Pickle, 221.

The references on the subject in the foregoing cases cited, establish conclusively the binding effect of reasonable customs of banks in general collections, as in other dealings, and cover, in principle, the case before us; but the exact question has been decided, and it is treated as settled.

In his work on "Commercial Paper," Mr. Randolph says: "If the holder of a bill directs that it be paid to a certain banker, procuring credit with such banker will amount to a payment of the bill. So, if the amount of a note is credited to a bank holding it for collection (according to the custom of dealings between the banks), it will be a payment, although the bank making the note and giving the credit failed on the day it was so credited." Vol. III., Secs. 1395, 1456. See also *Bank v. Bank*, 11 N. Y., 213, 214; *Briggs v. Bank*, 89 N. Y., 182; *Bank v. McClung*, 7 Lea, 492.

The doctrine has been extended, and collecting banks have been recognized as authorized to receive their own certificates of deposit in payment, and the debtor is discharged, even though the bank fails before remitting. 1 Morse on Banks, Sec. 305.

These principles are not in contravention of that which permits an agent to receive only money in payment of his principal's debt. If the principal

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select a bank as his collecting agent, he is presumed to understand the business methods by which such transactions are effected through usages of banks; actual ignorance of them is of no avail as an excuse, for, as said in the case cited by Mr. Morse on the last proposition herein stated, in respect to the transaction as a question of custom, ignorance of the plaintiff as to the existence of such usage was of no moment. Every business man must be held to know the method by which nearly all the banks in the country transact business by checks, drafts, and certificates of deposit. *Mortgage Co. v. Tibballo*, 63 Iowa, 468.

These business transactions are understood to be, and are in effect, the payment of money by one and its receipt by the other bank. It is impracticable, if not impossible, to go through the vain and empty formality of paying cash back and forth by each bank to every other on every separate check involved in the multiplicity of the transactions in which they are used. The banks must resort to a method of balancing accounts and settling on basis of results, and no man sending a check or draft for collection has any reason to expect that his collection will be made otherwise than all are made in this way. It is a money settlement, and the receipt of money in payment in the actual business sense that the law requires, under the reasonable custom adopted by banks as a necessity, and recognized as such throughout the world. It is the recognition and adoption of this

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view which has sustained that greatest of modern conveniences, the clearing-house system, which a contrary one would now overthrow. Neither authority nor 'policy' requires an abandonment of it, but, on the contrary, the Courts are impelled by both to uphold it.

The judgment is, therefore, reversed, and judgment entered here for defendant.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
WESTERN DIVISION.

JACKSON, APRIL TERM, 1893.

MINTER v. CLARK.

(*Jackson. April 13, 1893.*)

STATUTE OF LIMITATIONS. *Between guardian and ward.*

If the guardianship is terminated by the majority or marriage of the ward, no statute of limitations begins to run until the date of such termination against the ward's right to sue his guardian and sureties for dereliction, such as failure to renew bond and make settlements, occurring during the course of the guardianship. That cause existed for an earlier termination of the guardianship by removal, does not operate to terminate it and set the statute running.

Code construed: §§ 3451, 3472, 3473 (M. & V.); §§ 2757, 2776, 2777 (T. & S.).

Minter *v.* Clark.

Cases cited and approved: State *v.* Parker, 8 Bax., 498: Jones *v.* Ward., 10 Yer., 168.

FROM HARDEMAN.

Appeal from Chancery Court of Hardeman County. A. G. HAWKINS, Ch.

WOOD & McNEAL for Minter.

FRANK FENTRESS for Clark.

CALDWELL, J. This is a suit for the settlement of a statutory guardianship.

On the eighth of March, 1870, the County Court of Hardeman County appointed defendant, Thomas A. Clark, guardian of complainant, Arthur C. Minter, a minor between two and three years old. Clark continued to act as guardian until Minter attained his majority, on the second day of July, 1888. In the meantime, the guardian renewed his bond four times, and made several partial settlements.

His original bond was signed by G. W. Doyle and H. W. Doyle as sureties. The first renewal bond was executed April 2, 1872, with L. S. Holmes and W. W. Casselberry as sureties; the second, May 6, 1873, with W. W. Casselberry and G. W. Doyle as sureties; the third, July 3, 1876,

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with J. M. Pettigrew and G. W. Doyle as sureties; the fourth, December 1, 1879, with W. W. Sammons and G. W. Doyle as sureties. The last of the partial settlements was made on the first day of May, 1885. By that settlement, which is conceded to have been correct, a balance of \$936.07 was shown to be due from the guardian to the ward. Thereafter, at different times, the guardian made several small disbursements of money for and on account of his ward, leaving a large balance still due.

September 21, 1891, Minter filed this bill against Clark, the guardian, and G. W. Doyle, Casselberry, Pettigrew, and Sammons, four of the sureties, alleging the foregoing facts, and the additional fact that Clark had refused to settle his accounts, and seeking a decree against the guardian and said sureties for such balance as the Court might find to be due him.

The defendants demurred to the bill, assigning as cause of demurrer that the action was barred by "the statutes of limitation." The demurrer was overruled, with leave to rely upon the same defense in answer.

Clark thereafter died, and the bill was voluntarily dismissed as to him. Doyle and Casselberry suffered decrees *pro confesso* to be entered against them. Pettigrew and Sammons answered, and in their answer pleaded the statutes of limitation of three, of six, and of ten years as complete bars to complainant's action.

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On final hearing, decree was pronounced against Doyle and Casselberry for \$841, the amount found to be due from the guardian to the ward; but, as to Pettigrew and Sammons, the bill was dismissed, upon the ground that they were protected by the statutes of limitation interposed in their answer.

From that part of the decree refusing a recovery against Pettigrew and Sammons complainant appealed; and from that part allowing recovery against Casselberry he has prosecuted a writ of error.

The decree was right as to Doyle and Casselberry, but erroneous as to Pettigrew and Sammons.

- Complainant was entitled to a recovery against all of them. The suit was not barred as to any of them by any statute of limitations.

Ordinarily a guardianship ceases only when the ward attains the full age of twenty-one years if a male, or marries if a female. *Jones v. Ward*, 10 Yer., 168; *State v. Parker*, 8 Bax., 497. There is nothing in this case to take it out of the general rule.

Clark continued to be the guardian of Minter, and, as such, the proper custodian of his funds until Minter attained his majority. No cause of action accrued to Minter until he was of age. Never before that time did he have the legal right to demand and receive his estate from Clark.

It is true that Clark was derelict, in that he failed to make regular biennial settlements of his ward's estate, and to renew his bond every two years, as required by § 2499 of the Code; and it

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is also true that, for such dereliction, the County Court was authorized to remove him from the guardianship and appoint another in his place. Code, § 2500.

But that neglect on his part, and the existence of that authority in the County Court cannot, of themselves and without more, be held to have denuded him of his office, and conferred upon his ward, while yet a minor, a right to sue for and recover his estate.

A guardian cannot in that way cast off his official robes, and put the statute of limitations in motion against his ward. To allow him to do so, would be to give him the advantage of his own wrong.

If the County Court should remove an unfaithful guardian, and appoint another person in his room and stead, that would terminate the office of the former guardian, and give a cause of action against him for funds of the ward in his hands.

The same is true where a guardian is permitted to resign, and another is appointed in his place. *State v. Parker*, 8 Bax., 498.

In the case before us, there was abundant cause for removal, and a tribunal with plenary power to remove and fill the vacancy; but that was all. No removal was made, sought, or attempted; hence, the guardianship, with all of its legitimate consequences, continued until the majority of the ward, notwithstanding the non-feasance of the guardian. Neither he nor his sureties will be heard to complain that he was not removed.

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The three years' limitation pleaded by Pettigrew and Sammons is found in § 2757 of the Code, which requires that a person to whom a cause of action accrues while under disability, shall sue within three years after removal of that disability.

Complainant's cause of action not having accrued while he was under disability, but at the time he attained his majority, that statute is not applicable in this case; and, for that reason, could not have barred his action.

The statutes of six and of ten years (Code, 2775 and 2776), also pleaded by those defendants, are equally unavailing in this case, because neither ten nor six years elapsed between the accrual of the action and the commencement of the suit. As we have already seen, this cause of action accrued at the time complainant became of age, and he filed this bill three years, two months, and nineteen days thereafter.

The right of action, as against the sureties, did not accrue at the time they signed the bonds, nor two years thereafter, when the guardian failed to renew his bond as required by law. It did not accrue as to them in 1885, when he made his last partial settlement, nor at any time thereafter before the majority of complainant. The cause of action against the sureties is the same as that against the guardian, and it accrued against all of them at the same time.

Enter decree against Pettigrew, Sammons, and Casselberry for debt, interest, and costs.

Connor *v.* Bates.

CONNOR *v.* BATES.

(Jackson. April 15, 1893.)

1. REPLEVIN. *Enforcement of judgment.*

The successful plaintiff in replevin has the right to enforce by execution his alternative money judgment for the value of the property, unless the defendant can return the whole of the property detained, or has the right, under the judgment of the Court, to return less than the whole and to make an ascertained money compensation for the remainder.

Cases cited and approved: Sayres *v.* Holmes, 2 Cold., 263; Pickett *v.* Bridges, 10 Hum., 171; 104 Mass., 328; 41 N. Y., 317; 20 Wall., 486.

2. SAME. *Same.*

Acts 1885, Chapter 59, has no application to this case. It provides a remedy for a successful defendant in replevin, who has been unable to obtain return of his property or satisfaction of his alternative money judgment.

Acts construed: Acts 1885, Ch. 59.

FROM LAUDERDALE.

Appeal from Circuit Court of Lauderdale County.

T. J. FLIPPIN, J.

Connor v. Bates.

W. E. LYNN for Connor.

JAMES OLDHAM for Bates.

WILKES, J. This is a petition to supersede and quash an execution issued from the Circuit Court of Lauderdale County. A motion was made in the Court below to dismiss the petition for want of merits upon its face, which was sustained, and judgment was rendered against petitioner and his sureties for the debt, damages, and cost, from which he has prayed an appeal to this Court.

It appears that at the July term, 1892, of the Circuit Court of Lauderdale County, a judgment was rendered in favor of J. H. & Wm. Bates against John Connor, Jr., in a replevin suit involving the ownership of about 151 saw-logs, valued together at \$288.

In the petition it is alleged that the judgment rendered in the replevin suit is in the usual form of such judgments, to wit: That defendants, J. H. & Wm. Bates, were entitled to have the logs returned to them; that they were worth, as a lot, \$288, and awarding process of execution for the property, and, if it could not be found, then for the value. This judgment was against the petitioner, John Connor, Jr., as principal, John Connor, Sr., as surety on the replevin bond, and W. H. White, surety on the bond for appeal from a Justice of the Peace, where the suit originated.

Upon this judgment, what is styled a writ of *distringas* issued, reciting the recovery of the judg-

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ment and its substance, and directing the Sheriff to take from the possession of petitioner the lot of logs recovered, and deliver the same into possession of J. H. & Wm. Bates, and, further, to collect the costs of the cause, amounting to \$88.71.

This process came to the hands of the Deputy Sheriff, who collected from petitioner the costs, and receipt for the same was indorsed upon the process. John Connor, Jr., thereupon offered to deliver to the Sheriff, or to the defendants, J. H. & Wm. Bates, all the logs recovered in the replevin suit except twenty-four, which he had removed and shipped to Memphis, and sold after the replevin suit was commenced by him. He also tendered to the Deputy Sheriff \$39.03, in lieu of the twenty-four logs which could not be delivered. It is stated in the petition that these twenty-four logs contained 6,455 feet, and that \$39.03 was the highest market value of the same, with interest from the date they were replevied.

The Deputy Sheriff, under the advice and direction of the defendants, J. H. & Wm. Bates, declined to receive the \$39.03 in lieu of the twenty-four logs, and refused to receive the remainder of the logs, unless the entire lot was delivered. He returned the process, with the facts indorsed as above stated, and thereupon execution issued for the entire value of the lot of logs, reciting upon its face the previous proceedings. This execution was levied upon certain live-stock belonging to Jno. Connor, Jr., and the petition in this cause was

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thereupon filed to supersede and quash said execution.

It is insisted that the defendants, J. H. & Wm. Bates, were legally bound to receive the remainder of the logs undisposed of, and the \$39.03 in lieu of the twenty-four logs which had been sold, and could not be delivered.

It is further insisted that the issuance of an execution for money was irregular, illegal, and void, because contrary to the provisions of Chapter 59, Acts of 1885, page 114, and, that under this Act, no *fi. fa.* for money can be issued by the Clerk, but such *fi. fa.* must be awarded by the Court after the return of the writ of *distringas*.

It does not appear that when plaintiff replevied the logs he placed a separate valuation upon them, but they were valued as a lot in gross. Nor were they separately valued on the trial and when judgment was rendered for their recovery. Unless a separate valuation had been made of the articles replevied, the party replevying the same could not require the opposite party to accept a portion of the articles replevied, and a money compensation for the remainder.

If he desired to avail himself of this privilege, he should have shown upon the trial the value of such articles as he could not return.

The Sheriff, in executing his writ, had no authority to receive a portion of the property directed to be returned, and a money compensation for the articles not returned. Neither the Sheriff

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nor the party proposing to return the property or money in lieu had any power to fix the value of the articles returned, nor could the Sheriff do so in the absence of the property which had been sent away and sold, even if he had such authority.

It is true that if the property is of a distinctive separate character or kind, and capable of distinctive separate delivery, the party cast in the suit ought to have the right to deliver what he can and pay for what he cannot. *Pickett v. Bridges*, 10 Hum., 171.

This, however, cannot be done unless a separate, distinct valuation is placed upon the several articles sued for. After the judgment, the right to fix a separate value upon the several articles replevied no longer existed. See also *Sayres v. Holmes*, 2 Cold., 263; *Stevens v. Tuite*, 104 Mass., 328; *Sutherland on Damages*, Vol. III., p. 561.

We think the effect and construction of the Act of 1885, Chapter 59, page 114, need not be considered in this case. That Act applies only to cases where the property has not been returned to the defendant, and a writ of *fi. fa. has issued, and been returned unsatisfied in whole or part.*

The fact that it appeared upon the trial that twenty-four of the logs had been sold, and could not be delivered, cannot affect the conclusion reached. The petitioner should have shown the value of the twenty-four logs thus sold by him, on the trial, if he desired to make money compensation for them instead of returning them in

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kind. See *Cochran v. Gott*, 41 N. Y., 317; *Baily v. Griswold*, 20 Wall., 486; Am. & Eng. Ency. of Law, Vol. XX., p. 1115.

The Court is of opinion that petitioner was not entitled to any relief under his petition, and the judgment of the Court below is affirmed with costs.

Ellis & Gresham *v.* Ellis.

ELLIS & GRESHAM *v.* ELLIS.

(Jackson. April 15, 1893.)

NEW TRIAL. *Within what time granted.*

A new trial cannot be granted after the expiration of thirty days from the rendition of the judgment, unless within that time the Court, for good cause shown, has given an extension of time for that purpose. The Court's action granting a new trial after expiration of thirty days from rendition of judgment, in the absence of any extension, is *coram non judice* and void.

Code construed: § 3832 (M. & V.); § 3119 (T. & S.)

Act construed: Acts 1885, Ch. 65.

Case cited and approved: Railroad *v.* Johnson, 16 Lea, 387.

FROM SHELBY.

Appeal from Circuit Court of Shelby County.

L. H. ESTES, J.

G. W. WINFORD for Ellis & Gresham.

C. W. HEISKELL and MALONE & MALONE for Ellis.

WILKES, J. This was an action of replevin brought by A. B. Ellis before a Justice of the Peace for Shelby County for the possession of certain horses and mules. The trial was had December 21, 1891, but the decision of the Justice was

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not rendered until January 23, 1892, when he gave judgment for plaintiff. The defendants appealed to the Circuit Court of Shelby County, executing necessary bond.

The papers were not returned into Court by the Justice until the twenty-second of March, 1892, and on the twenty-sixth of March, 1892, the case being called for trial, the defendants made no appearance, and the judgment of the Justice of the Peace was affirmed.

On the seventh day of May, 1892, a motion was made by defendants to set aside the judgment by default and to re-instate the case for trial on its merits. To sustain this motion, an affidavit of J. W. Gresham, one of the defendants, was presented to the Court, in which was stated that through the default of the Justice of the Peace, no counsel was marked upon the papers for the defendants, and that, when the case was called for trial in the Circuit Court, counsel for defendants was sick and could not be present. This was the substance of the affidavit presented on the motion.

In his assignment of errors in this Court, defendants' counsel makes the further statement that he made the motion to set aside the judgment so soon as he was able to attend Court; and, further, that at the time the cause was called for trial, the defendant, Gresham, was absent from the State.

These facts, however, do not appear to have been stated in the affidavit.

Upon argument, the motion to set aside the

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judgment by default was sustained, and the cause was re-instanted for a new trial.

At a subsequent term of the Court, and on the twenty-eighth of September, 1892, the case came on for trial, when the plaintiffs' attorney moved the Court to set aside the order of May 7, 1892, and to leave the final judgment of March 26, 1892, in force and effect.

On argument, this motion was granted, and the original final decree of March 26, 1892, was re-instanted in full force and effect.

To this action of the Court, defendants excepted, and filed a bill of exceptions, and prayed an appeal to this Court, and the action of the Court on setting aside the order of the Court of May 7, 1892, is assigned as error.

By the Code, § 3832 of the compilation by Milliken & Vertrees, it is provided that a rehearing can be applied for only at the term of the Court at which the decree sought to be affected is rendered.

Until the passage of the Act of 1885, Chapter 65, this was construed to mean that such new trial might be granted at any time during the term at which it was rendered.

The first section of the Act of 1885, Chapter 65, provides that when an appeal, or appeal in the nature of a writ of error, is prayed from a judgment or decree of an inferior Court to the Supreme Court, the appeal shall be prayed for, and appeal bond shall be executed or the pauper

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oath taken, within thirty days from the rendition of the judgment or decree, if the Court holds so long; otherwise, before the adjournment of the Court, but for satisfactory reasons, shown by affidavit or otherwise, and upon application made within thirty days, the Court may extend the time to give bond or take the oath in term or after adjournment, but in no case more than thirty days additional.

"Sec. 2. In all cases where the appeal has not been prayed for within the time prescribed in the first section of this Act, the judgment or decree may be executed."

There was no application made in this case for a new trial within thirty days from the rendition of the final judgment of March 26, 1892; nor is there any sufficient excuse given why such motion was not made within that time.

After the expiration of thirty days from the rendition of the final judgment, the Circuit Court had no power to set aside such judgment and grant a new trial, any more than he would have had if the motion had been made at a subsequent term of the Court. The entire proceedings had in the case after the expiration of thirty days from the date of the final judgment were *coram non judice* and void.

This change in the former practice necessarily results from the operation and terms of the Act of 1885, Chapter 65, before recited. *M. & C. R. R. Co. v. Ed Johnson*, 16 Lea, 387.

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The judgment of the Court below, of date of March 26, 1892, is affirmed, and remains in full force and effect.

The appeal of defendants, Gresham and S. L. Ellis, is dismissed with costs.

Elrod *v.* Gray Lumber Co.

ELROD *v.* GRAY LUMBER CO.

(Jackson. April 15, 1893.)

JUDGMENT. *Rendered on holiday not void.*

A judgment is not void for having been rendered on one of the legal holidays—*e. g.*, twenty-second day of February, created by Acts 1889, Chapter 63, “on which all public offices of this State may be closed, and business of every character, at the option of the parties in interest or managing the same, may be suspended.” Public officers may, at their option, keep open their offices and transact official business on such holidays.

Acts construed: Acts 1889, Ch. 63.

Cases cited and approved: Bank *v.* Johnson, 3 Hum., 28; Lewis *v.* The State, 3 Head, 149.

FROM LAUDERDALE.

Appeal from the Circuit Court of Lauderdale County. T. J. FLIPPIN, J.

JAMES OLDHAM for Elrod.

THOMAS STEELE for Gray Lumber Company.

CALDWELL, J. W. T. Elrod sued the Gray Lumber Company before a Justice of the Peace on an account, and obtained a judgment for \$70.25.

The warrant was issued and duly served January 16, 1893, the trial of the case being at the

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time set for February 22, 1893. The case was tried and the judgment rendered on the latter day without an appearance, in any manner, on the part of the defendant.

Execution was issued from that judgment, and levied on the property of the defendant, and the property was advertised for sale.

Soon thereafter, on the sixteenth of March, 1893, the defendant filed its petition for *certiorari* and *supersedeas* in the Circuit Court, stating the facts hereinbefore recited; and upon them, and the additional statement that Elrod's account was unjust, seeking to have all the proceedings before the Magistrate transferred to that Court, to the end that the said judgment might be declared void, and the execution quashed.

The claim of petitioner to the relief sought was based upon the proposition that the judgment in question *was void, because rendered on the twenty-second of February, a statutory holiday.*

Elrod, through his counsel, moved the Court to dismiss the petition, for insufficiency upon its face. The motion was disallowed.

Thereupon Elrod admitted that his judgment was rendered on the twenty-second of February, and in the absence of petitioner, as the latter had alleged; and upon that admission the Court adjudged the Magistrate's judgment void, and quashed the execution. Elrod appealed in error.

Prior to the passage of Chapter 63 of the Acts of 1889, the twenty-second day of February had no

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greater legal sanctity in this State than any other secular day. The first section of that chapter is as follows: "That the first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, Good Friday, Decoration Day, Memorial Day, * * * *, also all days appointed by the Governor of this State, or by the President of the United States, as days of fasting or thanksgiving, and all days set apart by law for holding county, State, or national elections throughout the State, are made holidays, on which all public offices of this State may be closed, and business of every character, at the option of the parties in interest or managing the same, may be suspended."

Here the twenty-second day of February is made a legal holiday, on which all public offices of the State *may* be closed and business of every character *may* be suspended, at the option of the parties in interest or managing the same. *Permission* is given to close public offices and suspend public business on that day, but no *requirement* that it shall be done is imposed on any one. The controlling word is "*may*," not *shall*. The day may be observed as a holiday or not, as may be preferred; and whether the one course or the other is pursued, there shall be no just or legal ground of complaint.

It is true that *may* is sometimes rendered as *shall*, and *shall* as *may*, but that is done only when the manifest purpose of the instrument or statute-

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requires it. *Bank v. Johnson*, 3 Hum., 28; *Lewis v. The State*, 3 Head, 149.

No such purpose is found here. On the contrary, the context shows that the statute was intended as *permissive* merely, and in no sense *mandatory*. Not only is the word "*may*" used in such a way as to imply the grant of *permission* merely, but it is followed by other words, which expressly make the closing of office and suspension of business entirely *optional*.

It remains only to inquire who is authorized to exercise the contemplated option, and decide in a given case upon the observance or non-observance of the particular days as *holidays*.

The contention in behalf of petitioner is, that such option in the case at bar was with the Gray Lumber Company; that it had the right to elect whether the suit against it should be tried on the twenty-second of February; that by not appearing it elected that no trial should be had on that day, and that the Justice of the Peace before whom the case was pending, was by that election and the statute deprived of all power and jurisdiction to try the case at that time.

Though in some degree plausible, we do not think such the meaning of the statute. To our minds, it is clear that the option was with the Justice of the Peace, and not with the litigants, or either of them.

The provision of the law is, that the particular days named therein are made holidays, on which

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all public offices of the State may be closed, and business of every character suspended, at the option of *the parties in interest or managing the same*.

With respect to public offices, the officials themselves are manifestly *the parties in interest and management*; consequently, it is to them, and not to persons having business with them, that the option of the statute is given.

The Justice of the Peace who rendered the judgment here impeached, was *authorized*, but not *required*, to close his office and suspend business on the twenty-second day of February; and whether he should do so or not was a matter for him, and him alone, to decide.

His authority and jurisdiction to try causes properly before him, were as full and complete on that day as on any other day in the year, without reference to the appearance or non-appearance of the parties litigant; and the force and validity of judgments rendered by him on that day were in nowise impaired by the mere absence or dissent of parties to be affected thereby.

The Legislature did not intend that the power of a Court to try a case, or the validity of its proceedings, on any of the days named in the Act, should be dependent upon the presence or absent of parties duly notified.

The cases cited from Michigan (14 Am. Law Reg., 704), and Wisconsin (*Lampe v. Manning*, 38 Wis., 676), are not controlling, or even persuasive, authority in this case, for the reason that the de-

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cisions therein made were based upon local statutes entirely different from ours, those statutes being mandatory upon their face, and giving to the twenty-second of February the same character as Sunday, at least so far as the holding of Court and trial of causes are concerned.

Reverse the judgment of the Court below, and enter judgment here dismissing the petition for insufficiency upon its face. Petitioner will pay all costs.

McLemore v. Durivage.

MCLEMORE v. DURIVAGE.

(Jackson. April 22, 1893.)

1. STATUTE OF LIMITATIONS. *Connecting possessions.*

Connected, successive possessions of land, each for a period less than seven years, may be united to make out the requisite seven years' possession under the Act of 1819, where each successive possessor bore to his immediate predecessor the relation of a privy in estate—*e. g.*, that of heir to ancestor. (*Post, pp. 484-487.*)

Code construed: §§ 3459, 3460, 3461 (M. & V.); §§ 2763, 2764, 2765 (T. & S.).

Cases cited and approved: *Marr v. Gilliam*, 1 Cold., 488; *Erck v. Church*, 87 Tenn., 576.

2. SAME. *Possession of infant's lands.*

Joint or mixed occupation by an infant and his parent, or one standing *in loco parentis* of lands in which the infant claims the legal title, inures to the benefit of the infant's title. So likewise possession of land by parent, guardian, or one standing *in loco parentis*, claiming it for infant, inures to the benefit of his title. (*Post, pp. 484, 485, 492.*)

Cases cited and approved: *Davis v. Mitchell*, 5 Yer., 281; *Williams v. Walton*, 8 Yer., 391; *Knight v. Jordan*, 6 Hum., 101; *Stevens v. Bomar*, 9 Hum., 546; *Fancher v. DeMontegre*, 1 Head, 40; *Moore v. Walker*, 3 Lea, 665; *Ramsey v. Quillen*, 5 Lea, 184; *McBee v. Bearden*, 7 Lea, 731; *Welcker v. Staples*, 88 Tenn., 49; *Templeton v. Twitty*, 88 Tenn., 595.

3. WRIT OF ERROR CORAM NOBIS. *When it lies.*

Writ of error *coram nobis* lies to reverse a decree depriving an infant of lands to which he has a perfect title, where, by accident or mistake in the service of process, the infant and his guardian failed to receive, without fault or negligence on their part, such notice of the pendency of the suit as would have enabled them to make defense. (*Post, pp. 487-494.*)

Code construed: § 3823 (M. & V.); § 3110.

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Cases cited and approved: *Crawford v. Williams*, 1 Swan, 341; *Panesi v. Boswell*, 12 Heis., 323; *Jones v. Pearce*, 12 Heis., 286.

FROM SHELBY.

Appeal from Circuit Court of Shelby County.

L. H. ESTES, J.

W.M. M. RANDOLPH & SONS for McLemore.

WATSON & FITZHUGH for Durivage.

WILKES, J. These two actions (by consent tried together) involve the title to lot 15, block 12, in Fort Pickering, at Memphis, Tenn.

The former is an action of ejectment and the latter is a petition for writ of error *coram nobis*.

They were tried by the Judge of the Court below, Hon. L. H. Estes, without the intervention of a jury, and, upon demand made by counsel before trial, a special finding of facts was made, upon which judgment was rendered in favor of Charles Durivage for the possession and title of the lot in controversy.

There is an appeal to this Court by the heirs of John C. McLemore, and many errors have been assigned, all of which have been considered and will be passed upon in connection with a statement of the facts of the case as they appear in the record and from the finding of the trial Judge.

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The heirs of McLemore trace their title to a grant from the State of Tennessee by an unbroken and connected record chain, and they must, therefore, prevail in the ejectment suit unless the adverse claimant, Charles Durivage, can protect his possession under the statutes of limitation.

The claim and title of Charles Durivage rest upon the ground that through himself, his tenants, and those under whom he claims, he has had actual open, adverse possession under inclosure of the lot in controversy, under color of title, for more than seven years before action brought; and he therefore claims not only right of possession but a valid title to the lot under the provisions of the first and second sections of the act of 1819, compiled in the Code (M. & V.) as §§ 3459, 3460 and 3461.

It appears without dispute that lots 15, 16, 17, 18, 19 were inclosed together by a fence in 1871, and the inclosure has continued uninterruptedly ever since.

In 1871 Mrs. Cordelia Cook was in possession of the property, and built a house on two of the lots, which still remains, and she had possession of all the lots under one common inclosure until 1878, when she died of yellow fever.

Charles Durivage, Jr., was her only son and heir, and was present when his mother died; and, after her death, remained in possession of the property a short time only, dying during the same epidemic in 1878.

His wife, Vina Durivage, on the death of her

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husband, took possession of the property, and, about six months after her husband's death, gave birth to a son, the present claimant, Charles Durivage, Jr.

She rented out the property and collected the rents until her death in 1883, and, it is claimed, for the benefit of her infant son.

Her mother, Mrs. Welsh, the grandmother of claimant, survived the daughter, and is still alive, and the tenant who was in possession of the property at the death of Mr. Durivage, after her death, attorned to Mrs. Welsh, and she has collected rents ever since, as she says, for the benefit of the claimant, her grandson.

One Dennis Moss was tenant in possession under Mrs. Durivage at the time of her death, and, after attorning to Mrs. Welsh, he continued in possession until September 26, 1887.

The claimant had no legal guardian until September 24, 1887, when his grandmother, Mrs. Welsh, qualified as such guardian, and soon thereafter, September 26, 1887, she leased the property for a term of five years to the defendant, Shipley. This lease, by its terms, embraces lots 16, 17, 18, and 19, but these lots were, and had been, inclosed and held with lot No. 15, under the same inclosures by the same parties since 1871.

The lessor and lessee both understand that all the lots inclosed together are embraced in the lease, but lot No. 15 is not named or referred to by number.

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The statement of Mrs. Welsh is, that during the entire time the property has been held by her, and by her daughter, the mother of claimant, it was for his benefit, and the rents were collected for him. There is no testimony contradicting this statement. Several receipts given for rents from time to time are copied into the record, but they do not state on their faces that they are for rents paid for claimant. The record title of Mrs. Cook consists of a warranty deed from J. E. and Walter Merriman, of date October 17, 1877, conveying all of said lots 15, 16, 17, 18, and 19, in block 12.

It is claimed that title descended from Mrs. Cook to her son, Charles Durivage, Jr., and from him to his son, the present claimant.

A deed from John Hallum to J. E. Merriman, of date March 16, 1861, appears in claimant's chain of title.

A deed from McLean, Tax-collector, to Walter Merriman, of date April 4, 1870, also appears in his chain of title, but the title is not traced any further back.

It appears, therefore, that Mrs. Cook had possession of the lots and built the house upon them as early as 1871, or about six years before her deed from Merriman.

The Court below found that the deeds offered were good as color of title under the statutes, and that under them claimant and those under whom he holds had held adverse possession of the lot in dispute for more than seven years, and thereby

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acquired an indefeasible title; that the lots were all under one fence, and all in possession of the ancestors of claimant, or under them by tenants, and that the title of Mrs. Cook, under the Merriam deed, coupled with her possession, descended, on her death, to her son, Charles Durivage, Sr., and, on his death, to his son, Charles Durivage, Jr., the present claimant.

The Court further found from the evidence that the property was held for the present claimant, and that there was a privity of estate between the successive holders, and their successive possessions inured to the benefit of the present claimant under the provisions of both statutes of limitation, and the fact that lot No. 15 was not known or recognized by its number, made no difference if it was inclosed and adversely claimed with the other lots.

The Court was further of opinion, and so held, that complainant held adverse possession through privies in estate for more than seven years, and thereby acquired a complete title under the first section of the Act of 1819, and had set up a valid and good defense under both sections, the one conferring title and the other a possessory right to the premises.

On the first of March, 1890, the K., C. & M. Railway and Bridge Company filed a petition in the Circuit Court of Shelby County, against Susan McLean Green *et als.*, No. 3565 on the reference docket, for the purpose of condemning a portion

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of lot No. 15 for railroad purposes. Claimant and his guardian, Mrs. Welsh, as well as the heirs of McLemore, were made parties thereto.

On the same day, in the same Court, a separate condemnation proceeding was instituted by the same parties to condemn a portion of lots Nos. 16, 17, 18, and 19, adjoining lot No. 15, and embraced in the same inclosure, the number of this proceeding being 3562. To this latter suit claimant and his guardian were made parties, but the heirs of McLemore were not.

Notice in each case was served March 4, 1890, upon the guardian of claimant, but not on claimant himself. Copy of notice in the latter case was left with the guardian, but no copy of notice in the former case was left.

In the latter case a portion of lots Nos. 16, 17, 18, and 19 was condemned by regular proceeding, as provided by law. The damages were assessed at \$2,000, and were paid to the guardian of claimant.

In the former case the guardian of claimant made no appearance or defense, and a portion of lot No. 15 was condemned, the damages assessed at \$500, and paid into Court, and afterwards paid to the heirs of McLemore.

Under an order of reference, the Clerk reported that the title to the lot No. 15 was in the heirs of McLemore, and this report was confirmed by the Court.

Two months thereafter claimant and his guard-

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ian filed a petition for writs of error *coram nobis*, alleging that the title to lot No. 15 was in claimant under his title and possession; that this fact was not known to the Court, or adjudicated in the condemnation proceedings, because not presented to the Court, and that, if it had been so presented, the judgment of the Court would have been different.

As an excuse for not appearing and making defense to said proceedings, it was alleged, and sustained by evidence, that notices of both proceedings Nos. 3565 and 3562 went into the hands of an officer on the same day; that he called upon the guardian of complainant, and told her that a suit had been commenced against her in the Circuit Court, and gave her a copy of notice in No. 3562, but none in 3565. She states that she was under the belief that there was only one suit, and that it involved the whole of the lots belonging to her ward, and in the same inclosure.

She could neither read nor write, and she gave the copy of notice in No. 3562 back to the officer, and requested him to carry it to her attorneys, Malone & Malone, and request them to represent her ward and herself.

The officer did so, and handed the copy of notice in No. 3562 to Mr. Malone, but said nothing to him about No. 3565.

Malone at once docketed No. 3562, and attended to that case, but had no information of the pendency of No. 3565.

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Neither he nor the guardian knew that the guardian or claimant was a party to No. 3565, or had any interest in it. The guardian did not know the lots by their numbers, but believed and understood that her ward owned all the lots in the inclosure, and believed that the suit which she had employed the attorney to defend involved all of them.

The officer was not examined, but the attorney, Malone, substantiates the above statements, and says he did not know there was another suit, No. 3565, to which claimant was a party, or in which he had any interest; did not know the lots by numbers, and did not know that claimant had title to No. 15 or possession of same, but believed and understood that he was representing the entire property inclosed by the fence, and belonging to claimant. Hence he made no appearance in No. 3565, and had no notice of any step taken therein.

It appears from the evidence that, before the final judgment was rendered in No. 3565, Mr. Malone was informed that claimant had the title to lot No. 15, and that he was requested by Mr. Adams, the attorney of the railroad company, to file a petition in the case for him; but Malone, knowing nothing of claimant's title to the lot by its number, and laboring under the belief and impression that the entire property belonging to claimant was involved in No. 3562, declined to appear in No. 3565; and it seems very evident

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that neither Adams, the attorney for the railroad company, nor Malone were cognizant of the fact that claimant was already a party to No. 3565. It is worthy of remark that no guardian *ad litem* was appointed for claimant.

The Court below was of opinion that sufficient excuse had been given for failing to make defense to the condemnation proceedings, and to justify the filing of the writ of error *coram nobis*.

The petitioner, in due course of proceeding, assigned errors, and to these some sixteen demurrers were filed.

The railroad company, having paid into Court the value assessed on the property, and the lot having been condemned for its purposes, and occupied by it, the petition, as to the railroad company, was dismissed without prejudice as to the other parties.

The demurrers filed by the McLemore heirs were overruled, and the matters set up in the petition and proceeding *coram nobis* were heard with the ejectment suit by consent of parties, and the Court below gave judgment in both proceedings for claimant.

The judgment was, in effect, that claimant had title and right to possession of lot No. 15 under the ejectment suit, and also set aside so much of the judgment of condemnation in No. 3565 as adjudged the title to lot No. 15 to be in the McLemore heirs, and recalled and revoked so much of said judgment as found the McLemore heirs

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entitled to the \$500 paid in on the condemnation proceedings.

Without attempting to pass *seriatim* on all the contentions raised in the case, the Court is of opinion that the following statements of law and fact are conclusive of all material questions raised in each case:

First.—The deed from J. E. and Walter Merri- man to Cordelia Cook, of date October 17, 1877, was a sufficient assurance or color of title coupled with adverse possession under inclosures to meet the demands of the statute, and give to her, and those claiming under her, title to the lot in controversy. See the statutes, Milliken & Vertrees compilation, §§ 3459 to 3461, and notes there cited.

Second.—The possession of Mrs. Durivage, the mother, and of Mrs. Welsh, the grandmother, is shown by the proof to have been for the claimant. This would result, moreover, as a matter of law, the title being in the claimant, and he being a minor. *Daris v. Mitchell*, 5 Yer., 281; *Williams v. Walton*, 8 Yer., 391; *Knight v. Jordan*, 6 Hum., 101; *Stevens v. Bomar*, 9 Hum., 546; *Fancher v. De- Montegre*, 1 Head, 40; *Moore v. Walker*, 3 Lea, 665; *Ramsey v. Quillen*, 5 Lea, 184; *McBee v. Braden*, 7 Lea, 731; *Welcker v. Staples*, 4 Pickle, 49; *Templeton v. Twitty*, 4 Pickle, 595.

Third.—The title and possession of Mrs. Cook, and the possession of Mrs. Durivage and Mrs. Welsh, can be joined under the statute so as to raise and complete the bar. *Marr v. Gilliam*, 1

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Cold., 488-506; *Erick v. Church*, 3 Pickle, 576, 585, 588.

We are of opinion that the judgment and proceedings under the petition for writs of error *coram nobis* are correct.

The statutes (M. & V., § 3823) provide that "any person aggrieved by the judgment of the County, Circuit, or Chancery Court by reason of a material error in fact, may reverse the same upon writ of error *coram nobis* as herein provided."

Section 3829: The relief embraced in this article is confined to errors of fact, of which the person seeking relief has had no notice, or which he was prevented, by disability, from showing or correcting, or in which he was prevented from making defense by surprise, accident, mistake, or fraud without fault on his part.

The error of fact consisted in the possession under inclosure adversely for seven years of the lot No. 15 by the minor, Charles Durivage. This was a material fact not presented to the Court on the trial of No. 3565, and not adjudicated by the Court, and which, if presented, would have caused a different judgment.

Claimant was under disability, and by accident and mistake, without negligence or fault on his part, was prevented from setting up his claim to the property.

The excuse for failing to make defense to the condemnation proceeding is much stronger than in the case of *Crawford v. Williams*, 1 Swan, 341.

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See also *Panesi v. Boswell*, 12 Heis., 323; *Jones v. Pearce*, 12 Heis., 285.

Upon the whole case, we are of opinion that there is no error in the proceedings and judgment of the Court below, and the judgment is affirmed, and all costs will be paid by appellants and their sureties.

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WALKER v. PHILLIPS.

(Jackson. April 22, 1893.)

1. LAND LAW. *Special entry.*

An entry is special that refers to "some place, natural mark, or thing," whereby persons acquainted in the neighborhood can, by the exercise of reasonable industry, ascertain the land appropriated. Hence, an entry that calls to begin on a designated corner of a well-known tract of land, and to touch upon other well-known tracts, and to run in part with their lines, is a special entry.

Cases cited and approved: Barnett v. Russell, 2 Tenn., 10-21; Smith v. Craig, 2 Tenn., 287; Barnes v. Sellars, 2 Sneed, 33; Berry v. Wagner, 5 Lea, 564; Bleidorn v. Pilot Mountain Co., 89 Tenn., 201, 202.

2. SAME. *Elder special enterer's rights.*

Unless restricted by "older claims, navigable water-courses, or the calls of his location," the elder special enterer takes, as against all younger entries, the full quantity of land called for in his entry, and embraced in his grant. Subject to the above restrictions, course and distance may be disregarded in the survey of an entry, in order to obtain the quantity of land called for. Even "older claims" impose no restriction when the entry calls to include and exclude them.

Cases cited and approved, Hogat v. McCrory, 1 Tenn., 9; Kerr v. Porter, 1 Tenn., 353; Mursree v. Logan, 2 Tenn., 220; Bickerstaff v. Hughlet, 2 Tenn., 270; Smith v. Craig, 2 Tenn., 300; Carter v. Ward, 2 Tenn., 340; Phillips v. Robertson, 2 Tenn., 399; Tipton v. Miller, 3 Yer., 423; Coldwell v. Watson, 6 Hum., 499; Nolen v. Wilson, 5 Sneed, 338.

FROM DYER.

Appeal from Chancery Court of Dyer County.
H. J. LIVINGSTON, Ch.

Walker v. Phillips.

S. R. LATTA for Walker:

THOS. E. RICHARDSON and M. M. MARSHALL for Phillips.

CALDWELL, J. This is a bill to remove cloud from title, to stay waste, and for an account of timber alleged to have been cut upon the land in controversy.

The Chancellor dismissed the bill, and complainants appealed.

The ultimate question for decision is one of title, under certain grants from the State of Tennessee. The contestants on the one hand are the heirs of E. W. Tipton, and those on the other hand are the heirs of P. C. Ledsinger and Z. B. Phillips; the former being complainants and the latter defendants upon the record.

Complainants claim under the elder entry, elder survey, and elder grant; while defendants rely upon the younger entry, younger plat, and younger grant. Nothing else appearing, the better title would be with complainants, as a matter of course.

But the defendants assail the title of complainants, and say that their entry was void for vagueness, and that their survey and grant were void because of *non-conformity to the entry*.

The Tipton entry, made March 17, 1848, called for 1,000 acres, described as follows: "On the Obion River, in Dyer County, Range 10, Section 3, beginning at the north-west corner of T. M. Watson's No. —, 200 acres; thence south with

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his line to the Obion River; thence down the river to B. F. Buck's 81 acres enlargement; thence north with his line to the north-east corner of the same; thence west to his north-west corner; thence south to the river; thence down the river to T. L. Porter's line; thence north with his line to his north-east corner; thence west with his line to his north-west corner; thence south with his line to the river; thence down the river with its meanders so far that by running north and east, etc., to the beginning, it will include the complement, including and excluding all former entries."

The surveyor of Dyer County surveyed that entry, on the fifteenth of August, 1857, describing the land thus: "Beginning at the north-west corner of an entry in the name of T. M. Watson, and granted to McDavid and Phillips for 200 acres, runs south with the west boundary 200 poles to the north bank of the Obion River [to] a stake, sycamore, ash, birch, and cottonwood pointers, their corner; thence down the river as it meanders 40 poles to the east boundary of an entry in the name of B. F. Buck for 81 acres; thence north with his line and passing his north-east corner, in all 558 poles, to a maple with cypress pointers; thence east 358 poles to a stake and pointers; thence south to the Obion River 444 poles, a stake and cottonwood and willow pointers; thence down the river with its meanders to the south-east corner of McDavid and Phillips' survey of 200 acres; thence north with their line to their

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north-east corner; thence west with their north line 190 poles to the beginning."

On the first of July, 1859, a grant was issued on the foregoing entry and survey, with the calls and description given in the survey; and it is under that grant that complainants here assert title to the land therein described, they being the heirs of Tipton.

Ledsinger and Phillips made their entry Nov. 15, 1850, with this description: "Beginning at the north-east, or upper, corner of a 200 acres grant, in the name of Z. B. Phillips, on the north bank of the Obion River, running thence west with his north boundary line about 315 poles to his north-west corner; thence south with his west boundary line about 100 poles; thence west about 200 poles to the east boundary line of 1,000 acres entry in the name of S. J. Hayes; thence north with his line about 380 poles to his north-east corner and continuing north to the south boundary line of a 1,500 acres entry in the name of S. J. Hayes, No. 584; thence east with his line to his south-east, or lower, corner on the bank of said river; thence down said river as it meanders to the beginning, for 4,000 acres."

This entry was never surveyed, but on the twenty-second of October, 1859, it was platted on the entry-taker's book; and on the first day of November, 1859, a grant was issued to Ledsinger and Phillips, for 2,500 acres, bounded and described as follows: "Beginning at the north-east, or upper,

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corner of a 200 acres entry in the name of Z. B. Phillips, runs thence west with his line 140 poles to his north-west corner; thence north 576 poles to the south boundary line of an entry in the name of S. J. Hayes to a stake and pointers; thence east with said Hayes' south line 667 poles to his south-east corner on the Obion River; thence down the river as it meanders * * * to the south-east corner of said Phillips' 200 acre entry, a hickory; thence north 185 poles to the beginning."

The defendants, as the heirs of Ledsinger and Phillips, claim title under the latter grant.

The 200 acres mentioned in the Tipton entry and grant as the T. M. Watson entry is the same land referred to in the other entry and grant as the Z. B. Phillips entry and grant for 200 acres; the fact being that the entry of the 200 acres was made in the name of T. M. Watson, and that the grant was issued to Phillips and McDavid.

With this explanation and a reference to the calls it will be readily observed that the entry and grant of Tipton, and the entry and grant of Ledsinger and Phillips, all of them, call to begin on the same tract; those of the former beginning at the north-west corner, and those of the latter at the north-east corner. It will be further observed that after a few calls each grant departs from the exact calls of the entry upon which it is based; also that the younger entry invades the territory of the older entry, and the younger grant conflicts with the older grant.

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The interference between the two grants covers about 511 acres, no part of which is inclosed or in the possession of either party.

Complainants allege that they have the title under their entry and grant, and that the entry and grant of defendants constitute a cloud upon that title which should be removed.

Nothing is better settled in our law than that an older entry and younger grant will prevail against an older grant and younger entry, the entry being the inception of the title. For a stronger reason should an older entry and older grant prevail against a younger entry and younger grant, as in this case, unless there be some fatal defect in the older entry or grant.

First.—The Tipton entry, under which complainants claim, is not *vague*, as contended by defendants; on the contrary, it is *special*. It begins "at the north-west corner of T. M. Watson's No. —, 200 acres," a corner and tract well known at the time. That alone would make the entry special; it distinctly identifies the beginning corner of the land entered. But that is not all, the entry calls for corners of Buck's land and of Porter's land. Those lands were also well known in the neighborhood at the time; hence the calls for the north-east and north-west corners of each of those tracts identified other places in the line of the entry, and made it the more certain in its description of the land intended to be entered. By taking the calls of that entry, and making the

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inquiries suggested thereby, a subsequent enterer could have had no insurmountable difficulty in ascertaining the location of the land entered.

Tipton, the prior enterer, described his land with certainty to a common intent. That was all the law required of him, and was all that was necessary to make his entry *special*, and give him a good inchoate title as against all subsequent enterers.

Since the case of *Barnet's Lessee v. Russell and others*, decided by this Court in 1808, and reported in 2 Tenn., at pages 10 to 21, it has been uniformly held that an entry is special and good, which, in some part of it, contains a reference to *some place, natural mark, or thing*, from which the land intended to be appropriated can be ascertained by reasonable industry on the part of persons acquainted in the neighborhood. *Smith v. The Lessee of Craig*, 2 Tenn., 287; *Barnes v. Sellars*, 2 Snead, 33; *Berry v. Wagner*, 5 Lea, 564; *Bleidorn v. Pilot Mountain Co.*, 5 Pickle, 201, 202.

Second.—The next inquiry is with respect to Tipton's survey and grant. Do they so far depart from his entry as to render the grant void? We think not.

The Legislature and the Courts have always been solicitous that the first enterer should have the first survey and a perfect title; and to attain that end surveyors have been required to run out entries in the order made, observing the calls of each entry in succession so far as that could be done without

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causing conflict. Avoidance of conflict has been deemed of more importance than a literal observance of calls; and, as a consequence, it has been made the duty of the surveyor to depart from the calls when and so far as it may be necessary to prevent interference with prior claims; and, if in doing this he keeps reasonably within the scope of the particular entry being surveyed, his survey is good and binding upon all persons whose claims originated subsequent to that entry.

Some latitude is necessarily allowed to the surveyor. Neither his survey nor the grant issued in accordance with it can be avoided merely upon the ground that he might have surveyed the entry differently.

These propositions are deducible from our cases. *Hoggat v. McCrory & Gillespie*, 1 Tenn., 9; *Kerr's Lessee v. Porter*, *Ib.*, 353; *Murfree v. Logan*, 2 Tenn., 220; *Bickerstaff v. Hughlett*, *Ib.*, 270; *Smith v. Craig*, *Ib.*, 300; *Carter v. Ward*, *Ib.*, 340; *Phillips v. Robertson*, *Ib.*, 399; *Tipton v. Miller*, 3 Yer., 423; *Caldwell v. Watson*, 6 Hum., 499; *Nolen v. Wilson*, 5 Snead, 338-9.

The right of an enterer to the quantity of land called for in his entry, though in an opposite direction from the beginning corner, and without reference to subsequent claims, is forcibly illustrated in the case of *Caldwell v. Watson*. In that case the Court said: "This petition for *mandamus* is filed by the defendant, Fleming, to compel the surveyor of Obion County to survey an entry to which the

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relator is entitled, so as to include the quantity of land called for. The entry * * * beginning at the north-east corner of a tract of 629½ acres, entered in the name of Edward Harris; running south with the Harris line 226 poles to his corner; thence west with another line of Harris' tract; thence south; thence east; thence north, etc., for complement.

"When the surveyor came to run out this entry, he was compelled to stop the first line, running south, at the end of 215 poles, because of the north boundary of Miller's survey, an older claim. The next call for west could not be run because of older claims, and for the same reason the third call for south could not be run; so that at the end of 215 poles, the termination of the first line, the surveyor was compelled to run the second line east, which terminated on the west bank of Reelfoot Lake; he then ran northwardly to a point due east from the beginning, and thence west to the beginning, thus including only 483 acres instead of 640, the quantity called for. The land north of this survey was vacant at the date of the relator's entry; but the surveyor refused to run further north than the point of beginning, because before the survey William Willis had settled on the vacant land north, and near the point at which relator's entry began.

"We are of opinion that Willis' settlement formed no obstruction to the survey of relator's entry north, so as to include the quantity called for. That

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settlement was made after the entry of Fleming, who had a right to the quantity of land called for in his entry, unless he was restricted by older claims, natural boundaries, or the calls of his location. 2 Haywood & Cobb, 64, Section 3. In this case the relator was restricted by older claims, south and west, and by the lake on the east, so as to throw him upon the land north for his quantity; and as there is nothing in his entry restraining him from going north, it was the duty of the surveyor to extend his line north so as to obtain the quantity called for; for such running would have been in express compliance with the last call north, etc., for complement. The relator had a right to the quantity of land his entry calls for, which was vacant at its date, and which might be included by any proper mode of survey; and no subsequent claim could defeat that right." 6 Hum., 499, 500.

The difference between the calls of Tipton's entry and of his survey is much less than that between the calls of the entry and of the survey in the last named case, and in many of the other cases cited.

His survey and grant begin at the beginning of his entry, and pursue its calls almost literally until the north-east corner of Buck's 81 acres is reached, and then, instead of pursuing the other calls of the entry, west, south, west, north, west, south and with the meanders of the river, the survey and grant in their calls continue north a

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given distance, running thence east, south, west, north, and west to the beginning, including 1,000 acres. Through the first three calls the survey and grant followed the entry strictly, and after that they complied sufficiently with the last call of the entry. From the point of departure the survey and grant ran north, east, south, west, north, and west to the beginning; while the last call of the entry was "north and east, etc., to the beginning."

From the face of the papers alone, we think the survey and grant appear to conform to the calls of the entry sufficiently to make the grant good. But there are other facts in the record tending to the same conclusion.

The evidence shows that all the lands, included in the calls of the entry and west of the western boundary of the survey and grant, except about 90 acres adjoining Buck's tract on the north, were held by older claimants when Tipton made his entry. Those lands were, therefore, properly omitted from the survey. The surveyor had no right to include them as a part of the 1,000 acres entered. If he had included and excluded them in his survey, as was done in the entry, that would have made the situation but little, if any, better for Ledsinger and Phillips; for it would still have been his duty to survey for Tipton 1,000 acres, exclusive of those lands, and in doing so he would have covered about the same land he did in fact include in his survey.

The only omission made by the surveyor, so far

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as we are able to see from the record before us, was his failure to include the ninety acres of vacant land adjoining Buck on the north in his survey. Had he pursued the calls of the entry exactly, both including and excluding all prior claims, he would have included that ninety acres necessarily, and thereby might have included that much less of the land claimed by the younger enterers, Ledsinger and Phillips.

That is the most that he could have done in their favor. His failure to do it did not vitiate his survey, nor impair the validity of the grant which followed. *Carter v. Ward*, 2 Tenn., 340; *Hoggat v. McCrory*, 1 Tenn., 9.

The views expressed in this opinion and the decision made are not out of harmony with the case of *Nolen v. Wilson*, cited and much relied on by defendants.

In that case the Court said that an elder enterer "has a right to the quantity of land called for in his entry, unless he be restricted by older claims, navigable water-courses, or the calls of his location;" but that neither he by reason of his entry, nor the surveyor by reason of his official position, "can be allowed to depart from the entry to other lands not within its sphere, already legally appropriated by a younger enterer;" nor can an elder enterer, because he may be deprived of his land by the interference of better titles, or a navigable water-course, "be allowed to take other lands not within the scope of his entry, and already ap-

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propriated by a subsequent enterer." 5 Sneed, 338-9.

So say we in this case.

1. Tipton was entitled to the quantity of land called for in his entry, *that entry being special and he not being restricted by older claims, navigable water-courses, or the calls of his location.* Older claims were included within the calls of his entry, but he was not restricted by them, because they were excluded from the 1,000 acres entered, by the express terms of the entry itself. There was no restriction by navigable water-courses, nor by the calls of the location.

2. Tipton is not allowed to depart from his entry and take other lands not within its scope or sphere. On the contrary, the survey and grant are in reasonable conformity to the calls of his entry, and the land taken is entirely within its scope or sphere, as ascertained by well-recognized rules of surveying applicable to such a case.

Reverse, and enter decree for complainants.

K. of P. v. Rosensfeld.

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K. of P. v. ROSENFELD.

(*Jackson. April 22, 1893.*)

1. CHARGE OF COURT. *Special instructions.*

If special instructions are correct as given, it is not error for the Court to have refused to give them in the exact language of the requests. Counsel are not permitted to dictate, even by special requests, the terms and expressions to be used by the Court in his charge to the jury.

2. LIFE INSURANCE. *Assured's statement and concealment of facts.*

The Court's charge is not subject to exception by the insurer, where it is stated, in substance, to the jury that there can be no recovery upon a life policy, if the assured, in procuring it, misstated, failed to state, or concealed any fact touching his health that was material to the risk, and which was known to him, or could have been ascertained by him upon reasonable inquiry; and stating, further, that it was immaterial whether the assured was questioned about the matter or not, and likewise immaterial whether he acted in good or bad faith, or from intention or through ignorance and mistake.

Case cited: Boyd v. Insurance Co., 90 Tenn., 212.

3. SAME. *Same.*

And the Court properly refused to charge, upon the insurer's request, that the assured's action upon a life policy would be defeated if the assured, though acting in perfect good faith, failed to inform the insurer of latent and undeveloped disease, of the existence of which the assured had no knowledge or suspicion, and which could not have been discovered by any reasonable inquiry or diligence on his part.

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

K. of P. v. Rosenfeld.

F. P. Poston for K. of P.

J. M. GREER for Rosenfeld.

WILKES, J. The plaintiff in error issued an insurance policy on the life of Morris Rosenfeld, the husband of defendant in error, on November 25, 1887, for \$3,000.

The insured died August 12, 1888, and payment of the policy having been refused, this action was brought to recover the amount.

The cause was tried in the Court below before a jury, and judgment having been rendered for the amount of the policy, an appeal has been prayed to this Court by the Order.

It is conceded that there is sufficient evidence to support the verdict, but it is claimed there is error in the action of the Court in not properly charging the law applicable to the case.

The theory of the company is that the assured was in failing health at the time he procured the issuance of the policy; that he then had an habitual cough and incipient consumption, and it is charged that he willfully concealed the true facts from the company for the purpose of defrauding it; that he stated, in response to questions, that he was not predisposed to bronchitis, and had never had that disease; that he was not suffering from general debility; and that these statements were untrue, and avoided the policy because not true as stated.

Some special requests for additional charges were

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made, and some objections were made to the charge as given. The real point of error assigned is that the Judge in his charge to the jury confined them in their investigation to the truth or falsity of answers given to questions asked by the examiner, and to statements made in the application by the assured, and was not broad enough to cover other matters material to the risk, *but not covered by the language of the questions asked and answers made.*

It is earnestly insisted that any statement made in the application, or answer to direct questions, or concealment made of any material fact affecting the health of the assured, whether inquired about or not, would vitiate the policy if untrue, whether it was known to be untrue or not, and whether the concealment was intentional, or the result of want of information or ignorance, and whether with or without any intention or desire to mislead or misrepresent, or, in other words, if any fact material to the risk was either misstated or concealed, or not stated, it would avoid the policy, whether done knowingly or ignorantly, intentionally or through mistake.

The Court charged the jury, in substance, that if any statements or answers made by the assured, at the time of his application or examination, were untrue, there could be no recovery; and again, "in answer to any interrogatory put either by the physician or others, any fact known to the assured, or that in all reasonable probability ought to have been known to him, that would affect his expect-

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ancy or cut it short, ought to have been made known by him;" and again, "I have said to you, gentlemen of the jury, and I say again, that any fact that in all reasonable probability ought to have been known to the man, although he may have been ignorant of it, still he ought to have known the fact, then it was just as much concealment as if he did know it, because it was the assured's business to hunt up his history just as it is a man's business to look after his home, and know whether there is a tenant in it or not, when he applies for insurance on it, and represents that it is occupied. He must know such facts, so that in all reasonable probability a man does know what he ought to know."

The Court did not give the special instructions asked in the exact language of counsel, nor was it error not to do so. Counsel cannot dictate the terms and expressions to be used by the Court, even in special requests. The Court did, however, charge in substance all that plaintiff in error requested.

It is earnestly insisted that this case is governed by the principles laid down in the case of *Boyd v. The Insurance Co.*, 6 Pick., 212, in which it is stated that "if, however, the representation be made of a fact material to the risk and relied on by the insurer, it is the undoubted general rule that such representation, whether made intentionally or through mistake or in good faith, avoids the policy. 'It is the fact that the insurer relies on the

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truth of the representation, and not on the intention which misleads, whether fraudulent or otherwise, that gives the right to complain."

That was a case of insurance against fire, and the representation or statement was that the property was a dwelling and occupied by a tenant. This was a fact material to the risk, one on which the insurer relied, and one which the assured must have known, or by the slightest diligence could have known, and the rule was without doubt correctly applied.

The same principle, properly limited, applies as well to life as it does to fire insurance policies and applications, and the misstatement or concealment of any facts material to the risk, which is known to the assured, or, upon proper investigation and the exercise of proper diligence, could be ascertained, will avoid the policy.

A man cannot, however, know with such exact certainty the condition of his system as he can the status and condition of his property. The presence or absence of any disease or predisposition to disease is to some extent a matter of opinion. There may be hidden or undeveloped disease of which an applicant for insurance may be wholly ignorant, and of which he may not have the slightest suspicion, and which may or may not be ascertained by an examiner upon his medical examination.

This cannot be said of his property. A man may always know or ascertain the condition and status of his property.

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While the rule is the same in both cases, the application, from the very nature of the case, must be to some extent different.

If the assured, when he makes his application, know, or have any reason or ground to believe, that he has any disease, even though it may be latent and undeveloped, he is in duty bound to make it known, whether specially questioned or not; and if he fail to do so it will amount to a misstatement or concealment, as the case may be, that will avoid his policy; but if there should be in him some latent disease, of which he knows and suspects nothing and has no means of ascertaining, he cannot be said to have either misrepresented or concealed the facts in such a sense as to avoid his policy. There can be no concealment of a fact which is not known and cannot be known by proper inquiry.

We think in this cause the plaintiff in error has no ground to complain of the charge of the Court, and that it was extremely favorable to the order, and there is no error in the judgment of the Court below, and the same is affirmed with costs.

Wood *v.* Tomlin.

WOOD *v.* TOMLIN.

(Jackson. April 27, 1893.)

I. REVIVOR. *Of administrator's suit.*

Where an administrator sues in his representative capacity, upon a note taken, payable to himself as administrator for a debt due his intestate's estate, the suit may be revived upon his death during its pendency, either in the name of his own administrator, or in the name of an administrator *de bonis non* of the first decedent.

Cases cited and approved : Scott *v.* Alexander, 2 Sneed, 652; Smith *v.* Pearce, 2 Swan, 128.

FROM MADISON.

Appeal from Chancery Court of Madison County.

A. G. HAWKINS, Ch.

McCORRY & BOND and H. W. TOMLIN for Tomlin.

HAYNES & HAYS for Wood.

CALDWELL, J. W. A. Wood, as administrator of Elizabeth Martin, deceased, filed the bill in this cause to collect such balance as might be ascertained, upon an account, to be due on a certain promissory note executed by the defendant, Jno. L. H. Tomlin. Decree was rendered in favor of complainant for \$1,033.16, and defendant appealed.

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Complainant has died pending the appeal, and motion is now made to revive the cause in the name of his administrator. Defendant resists the motion, and assigns as reason for so doing that no revivor can be had except in the name of an administrator *de bonis non*.

Upon the death of an administrator or executor, no interest in property left unadministered is transmissible to his own representative; but all such property as remains in specie, or as is capable of being identified as the specific property of the estate represented by him, passes to the administrator *de bonis non* of the original testator or intestate. He succeeds to all the power, authority, and legal duties belonging to the former executor or administrator in his representative capacity, so far as respects that part of the estate left unadministered, and takes up the administration where his predecessor left it. *Stott v. Alexander*, 2 Sneed, 652; *Smith v. Pearce*, 2 Swan, 128.

This, however, is not the ordinary case of *unadministered property*, in which the right is clearly against the personal representative of a personal representative, and in favor of the administrator *de bonis non* of the original decedent. The note here in suit, is not an *original asset* of Elizabeth Martin's estate. It was not executed to her in her life-time; but was given to W. A. Wood, as her *administrator*, for borrowed money.

Parsons says: "It has been a vexed question whether a note payable to it, as *executor*, and

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given for a debt due to the estate, will be regarded as assets. It was once held that it would not; and, therefore, that a count upon such a note could not be joined with counts upon promises made to the testator in his life-time. But this doctrine has since been overruled, and it is now well settled that such a note will be assets, at least at the election of the executor. * * * Upon the same principle, if an administrator who has received such a note, dies before it is paid, it goes properly with the other assets into the hands of the administrator *de bonis non*, and he may sue upon it, and demand and receive payment." 1 Parsons on Notes and Bills, pages 155, 561.

In the case of *Cotherwood v. Chaboud*, 1 B. & C., 150, which is cited by the author for the last proposition, one of the Judges said that the various cases might be reconciled upon the suggestion that either the administrator *de bonis non* or the administrator of the administrator could maintain a suit upon such a note.

Daniel, referring to the first proposition laid down by Parsons, says: "It is settled now that a bill or note payable to it, as executor, is assets in his hands—at least, at his election," etc. 1 Daniel's Neg. Insts., sec. 268.

Schouler uses this language: "A note payable to A B, executor (or administrator) of C D, is said to be payable to A B personally, the words, 'executor,' etc., being merely descriptive. On the death

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of A B, therefore, the suit is properly revived in the name of his personal representative; at all events, if he holds possession, and if there be no averment of assets. But this rule should not interfere with the right of an executor *de bonis non* to receive possession of the unadministered assets of the estate he represents, and, accordingly, such administrator is held capable of suing, as such, upon notes or other evidences of debt payable in terms to his predecessor in the administration, as executor or administrator, provided he make proper averment as to the facts, and produce or account for the instrument." Schouler's Exrs. and Admrs., Sec. 411.

Another late author says: "In like manner, where commercial paper is given to one as executor or administrator, such words are held to be merely *descriptio personæ*, and the bill or note will be the individual property of the payee named. * * * So, where the note is made to one as executor or administrator, he may sue on it in his own name. He may also sue on it in his representative capacity." 1 Randolph Com. Pap., sec. 440.

Redfield states his views thus: "And it seems that upon notes and bills given to the personal representative, as such, for debts due the estate, he may sue in his representative capacity, or he may sue in his own name, treating his representative capacity alleged in the contract as a mere description of his person, *descriptio personæ*. So in cases where the administrator may sue in his rep-

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representative capacity, the administrator *de bonis non* may maintain an action, although there are some early cases to the contrary." 2 Redfield on Law of Wills, p. 192, Subsec. 3.

In the case of *Abingdon v. Tyler*, 6 Cold., 504, where an executor had sold land and taken purchase-money notes payable to himself as executor, this Court said: "The modern and prevalent opinion is that notes of the kind [in question] are assets of the original decedent, and pass to and are suable by the administrator *de bonis non*. 1 Parsons on Bills, etc., 155; 2 Swan, 127. However this may be, action may likewise be maintained at law, upon notes of the present kind and form, by the original representative in his representative character, and upon his death by his personal representative. 1 Parsons on Bills, 157; 1 Vern., 473; 2 Redfield on Wills, 192; 1 B. & C., 150."

From these authorities and the facts already recited it seems clear that Wood could have brought this action in his own name, or in his official character, at his election; and that, having elected to pursue the latter course, the note involved should here be treated as an asset of the estate of his intestate, and not as an asset of his own estate.

Having brought the suit in his representative capacity, and died before its termination, we are of opinion that either his own administrator, or an administrator *de bonis non* of Elizabeth Martin,

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his intestate, might be entitled to a revivor in his name, the recovery in either case to be subject to all proper accounts between the two estates.

It does not appear that there is an administrator *de bonis non*. Only the administrator of Wood applies for a revivor. The motion is allowed.

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McLENDON *v.* STATE.

(Jackson. April 29, 1893.)

1. SHERIFF. *Liability for making arrest under void process.*

For making arrest under process void upon its face, a Sheriff is personally responsible in damages to the party arrested. (*Post, pp. 523, 524.*)

2. SAME. *Same. Suit not maintainable upon official bond and in name of the State.*

But suit for such arrest cannot be maintained, even against the Sheriff, upon his official bond and in the name of the State for the use of the injured party. (*Post, pp. 529, 530.*)

Case cited and distinguished: *Turner v. Collier*, 4 Heis., 89.

3. SAME. *His sureties not liable for his illegal arrest, when.*

The Sheriff's sureties upon his official bond are not liable for his illegal arrest of a person under process void upon its face. (*Post, pp. 526-528.*)

Cases cited and approved: *Lytle v. Etherly*, 10 Yer., 389; *Crutchfield v. Robins*, 5 Hum., 15; *Draper v. State*, 1 Head, 262; *Turner v. Collier*, 4 Heis., 89.

Cited and distinguished: 111 U. S., 17.

4. VOID PROCESS. *Not running in name of State.*

A writ or other process that does not run in the name of the State is void upon its face. (*Post, pp. 525, 526.*)

Constitution construed: Art. VI., Sec. 12.

Cases cited and approved: *Mayor, etc., v. Pearl*, 11 Hum., 250.

Cited and distinguished: *White v. State*, 3 Heis., 338; *Lyle v. Longley*, 6 Bax., 286.

5. SAME. *Ex parte order for re-arrest of discharged convict.*

An *ex parte* order by a Criminal Judge for the re-arrest and detention of a discharged work-house convict is void, and affords no protection to the officer executing it, where it appears upon the face of the order that the arrest is to be made in disregard and contempt of the

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judgment of another competent Court discharging the convict upon *habeas corpus*. (*Post, pp. 523, 524.*)

Constitution construed: Art. I., Sec. 15.

Code construed: §§ 4470, 4473 (M. & V.); §§ 3720, 3723 (T. & S.).

Cases cited and approved: *The State v. Taxing District, 16 Lea, 240;*
State v. Galloway, 5 Cold., 336; 18 Wall., 163; 4 Wall., 3; 93 U. S., 18; 60 N. Y., 570.

FROM SHELBY.

Appeal from Circuit Court of Shelby County.
L. H. ESTES, J.

JAMES M. GREER and MALONE & MALONE for McLendon.

L. T. M. CANNADA for State.

CALDWELL, J. This is an action of damages for false imprisonment, brought in the name of the State of Tennessee for the use of Henry Kennedy, against A. J. McLendon, Sheriff of Shelby County, and the sureties on his official bond.

Trial before Court and jury resulted in verdict and judgment in favor of the plaintiff and against all the defendants for \$500. The defendants have appealed in error, and ask a reversal in this Court, upon several grounds.

The principal averments of the declaration are, in substance, that the plaintiff, Henry Kennedy,

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was confined in the work-house of Shelby County under a void judgment of the Criminal Court of that county; that, while so confined, his father sued out a writ of *habeas corpus* in the Circuit Court of Shelby County for his release; that the Judge of the latter Court heard his case upon that writ, adjudged his confinement illegal, and ordered that he be at once discharged; that, in defiance of that action of the Circuit Court, the defendant, A. J. McLendon, Sheriff of Shelby County, immediately re-arrested him and returned him to the work-house, where he was wrongfully and illegally confined for a period of fourteen days; that in so re-arresting and confining plaintiff, the Sheriff had no authority, but acted under a void order of the Judge of the Criminal Court, made upon the latter's learning of the pendency of the *habeas corpus* proceeding.

It is also averred that defendant, A. J. McLendon, on a certain day executed his official bond as Sheriff of Shelby County, with his co-defendants as sureties thereon, and that the bond was breached by the aforesaid re-arrest and confinement of plaintiff, Henry Kennedy, whereby the defendants became liable for damages to the State of Tennessee, for his use, in the sum of \$50,000, that being the penalty of the bond.

The defendants, after some preliminary steps had been taken, filed a joint plea of not guilty; and the case was tried upon the issue thereby formed.

Though much evidence, both parol and docu-

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mentary, was introduced for the consideration of the Court and jury, the only part of it necessary to be here mentioned is the process under which the alleged wrongful and illegal arrest and confinement were made. That process was but a copy of an order spread upon the minutes of the Criminal Court. It was in the following words and figures:

"IN THE CRIMINAL COURT OF SHELBY COUNTY.

"SEPTEMBER TERM, A. D., 1890.

"WEDNESDAY, Nov. 26, 1890.

"*To A. J. McLendon, Sheriff:*

"You are ordered and directed that, after the cause of the detention of Henry Kennedy, now in work-house of the county, shall have been inquired into, to the entire satisfaction of His Honor, L. H. Estes, Judge of the Circuit Court, whatever may be his conclusion as to whether such detention be legal or otherwise, you take the body of said Henry Kennedy and again deliver him to the Superintendent of the Shelby County work-house, there to be confined and not to go hence without the further orders of this Court. You will in no-wise omit, etc.

"A true copy from the minutes.

"Attest:

"R. S. CAPERS, Clerk.

"W. W. TOPSCOTT, D. C."

On that paper was this indorsement:

"Executed on the sixth day of December, 1890,

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by arresting the said Henry Kennedy and placing him in the work-house as is ordered.

"This December 6, 1890.

"A. J. McLENDON, Sheriff.

"By L. B. WILLIAMS, D. S."

The charge of the trial Judge with respect to the foregoing order or process, was, in effect, that it was void upon its face; that it gave the Sheriff no authority for the arrest and confinement complained of; and could, therefore, afford him no protection in this action.

The instruction was correct. The order in question was utterly void upon its face.

First.—The Judge of the Circuit Court, acting under due forms of law, as he is presumed and shown in this case to have been, had ample power and jurisdiction to conduct the *habeas corpus* proceedings, and to discharge the plaintiff, Kennedy, from illegal restraint under a *void* judgment, as he is here alleged and shown to have done. Code, §§ 3720 and 3723; *The State v. Taxing District*, 16 Lea, 240; *The State v. Galloivay*, 5 Cold., 336; *Ex parte Lange*, 18 Wall., 163; *Ex parte Milligan*, 4 Wall., 3; *Ex parte Parks*, 93 U. S., 18; *Tweed v. Liscomb*, 60 N. Y., 570.

On the other hand, the Criminal Court was wholly without power and jurisdiction to defeat that result, by causing Kennedy to be re-arrested and recommitted for the same offense, and under the same *void* judgment, as was the purpose clearly

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disclosed by the terms of the order itself. Constitution, Article I., Section 15.

Judged by the facts so disclosed, the order was void upon its face. Being so, it gave the Sheriff, who is presumed to have known the law, no authority for his action, and affords him no protection.

Second.—"All writs and other process shall run in the name of the State of Tennessee, and bear teste and be signed by the respective clerks." This is the requirement of the Constitution, as found in Section 12, Article VI., of that instrument.

Clearly, the order here in question, if possessed of any virtue at all, was a *writ* or *other process* within the meaning of the Constitution. It was intended to serve the purpose of a *writ* or *other process*, and as such it could have been valid, if so otherwise, only when running in the name of the State of Tennessee. It did not so run, and, for that additional reason, it was void upon its face. If it ran in any name at all, it was only in the name of the Criminal Court of Shelby County.

In the case of *Mayor and Aldermen v. Pearl*, 11 Hum., 250, 251, it was held that a distress warrant for the collection of taxes, was void because running in the name of the "corporation of Nashville" instead of in the name of the State of Tennessee, as required by the Constitution. In that case, after quoting the words of the Constitution, the Court said: "This requirement applies

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to all process, civil or criminal, issued by any Court or tribunal established by law, having authority to issue process; to process issued under a valid corporation ordinance or by-law, as much as to process from a Court of record or Justice of the Peace. That construction meets our approval, and controls this case on the point being considered.

The question as to whether or not the processes considered in *White v. The State*, 3 Heis., 338, and *Lyle v. Langley*, 6 Bax., 286, ran in the name of the State, was not raised in either of those cases. It was decided in the former of those cases that a "venire facias juratores," and in the latter that an attachment writ, signed by the Judge instead of the Clerk of the Court, was valid.

After the trial Judge had delivered his charge to the jury, the defendants requested him to give additional instructions, in these words: "If you find that the process under which McLendon arrested the plaintiff was without authority of law and void under the instructions given you in this case, then, in arresting and imprisoning the plaintiff, McLendon was acting beyond the scope of his authority as Sheriff, and W. J. Chase and the other sureties on the Sheriff's bond are not liable for his acts in making such arrest."

The refusal of the Court to give these instructions was erroneous. The action of the Sheriff, in arresting the plaintiff under void process, must be regarded in the same light as if he had arrested

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him without any process at all. He acted entirely without authority of law, and was, therefore, a trespasser. Had he acted under valid process, and misused or abused it, both he and his sureties would have been liable for the consequences of the misuse or abuse; but having assumed to execute void process, he was, for the time, without the scope of his official character, and, for that reason, did not and could not bind them.

The obligation of the bond was that he should "well and truly execute and due return make of all processes to him directed; and pay all fees and sums of money by him received, or levied by virtue of any process, unto the proper officer, or to the person entitled; and faithfully execute the office of Sheriff and perform its duties and functions during his continuance therein."

The wrongful and illegal arrest of plaintiff was in no sense a breach of that obligation. It was not a failure to execute and return process well and truly, nor to pay over money to parties entitled, nor to execute the office of Sheriff, and perform its functions and duties. He had no legal process in his hands, no money to pay over, no official function or duty to execute or perform with respect to the plaintiff.

The law of the land forbade him to arrest plaintiff, or perform any other act by virtue of said process; but the terms of his bond did not stand in his way. They did not contemplate such an act, and were not breached by it.

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Our conclusion on this point is in harmony with the reasoning of this Court in several cases. *Lytle v. Etherly*, 10 Yer., 389; *Crutchfield v. Robinson*, 5 Hum., 15; *Draper v. State*, 1 Head, 262; *Turner v. Collier*, 4 Heis., 89.

The last case is precisely in point, on the proposition that sureties of a Sheriff are not responsible for his acts with respect to void process. The effort in that case was to hold a Sheriff and the sureties on his official bond liable for money collected by him under an execution, which had become *functus officio* by lapse of time. The Court said:

"Can a decree be rendered against Love for his action officially as Sheriff, under the circumstances stated? It is to be borne in mind that the bill seeks to charge him for his action as Sheriff, and he and his sureties on his official bond are made defendants with this view. It follows that he must be charged according to the allegations of the bill. In this view of the case, the fact that the execution was *functus officio* and the deductions sought to be drawn from it that the Sheriff had no authority to collect the money as Sheriff without an execution, would relieve Love and his sureties in this case. The sureties could not be held responsible for his action in a matter not of official duty, or in the performance of the duties of his office; and Love would not be chargeable on the allegations of the bill seeking to hold him responsible in his character as Sheriff for official default, as he could only be charged as an agent, if at all."

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The question here is very different from that decided in the case of *Lammon v. Fensier*, 111 U. S., 17. There the Marshal, with a valid attachment writ in his hands, misused it by seizing the property of a stranger to his process. The act was adjudged a breach of his bond, for which his sureties were liable. It was a failure to faithfully discharge a duty of his office.

Not so here, McLendon had no valid writ. His process was utterly void. It conferred no authority, imposed no duty, justified no official action.

The trial Judge also erred in refusing to further instruct the jury, as requested, that the Sheriff himself could not be held liable *in this case* for his action under process found to be void upon its face.

This is an action upon an official bond, brought in the name of the State of Tennessee, for the use of Henry Kennedy. Such an action, so brought, can be maintained against no one, unless a breach of the bond be in fact shown. The bond could not have been breached by the execution of the void process in question; hence, the action taken under that process affords no ground of recovery against any one *in this case*, not even the Sheriff.

Had the suit been in the name of Kennedy, it might (in the absence of a contrary holding in the case of *Turner v. Collier*, 4 Heis., 89) be plausibly argued that the averment as to the breach of the bond could be passed by as imma-

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terial, and a recovery allowed upon the remaining facts against McLendon in his individual or personal capacity; but, having been brought in the name of the State, there can be no force or merit in such a suggestion.

The name of the State cannot be used as a party litigant, by one citizen against another citizen in redressing a private wrong, though done by the latter during his incumbency of public office.

Reverse and remand.

State, *ex rel.*, v. Davidson.

*STATE, *ex rel.*, v. DAVIDSON.

(Jackson. April 29, 1893.)

NOTARY PUBLIC. *Woman not eligible to office of.*

A woman is not eligible to the office of Notary Public in this State, there being no constitutional or statutory provision enabling her to hold such office.

Cases cited and approved: 131 Mass., 376; 41 Am. Rep., 239; 99 Ill., 501; 39 Am. Rep., 34; 21 Wall., 162; 16 Wall., 130; 6 Allen, 558; 14 Allen, 539.

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

GEO. B. PETERS, District Attorney-general, and F. T. EDMONDSON for State.

HOLMES CUMMINS, METCALF & WALKER, E. L. BULLOCK, McCORRY & BOND, TURLEY & WRIGHT, C. W. HEISKELL, GEORGE M. BARTON, JAMES M. GREER, LUKE W. FINLAY, NEIL & DEASON, HAMILTON PARKS, MALONE & MALONE, G. T. FITZHUGH, R. G. BROWN, HUGH N. EDGINGTON, MORGAN & McFARLAND, F. P. POSTON, HENRY CRAFT, JR., S. J. SHEPHERD, H. C. WARRINER, TAYLOR & CARROLL, GANTT & PATTERSON,

* Reported and annotated in 20 L. R. A., 311.—REPORTER.

State, *ex rel.*, v. Davidson.

LEHMAN & LEHMAN, A. H. DOUGLASS, CASEY YOUNG,
and A. J. BUCHANAN for Davidson.

WILKES, J. This is an action of *quo warranto* by the State of Tennessee on the relation of Geo. B. Peters, District Attorney-general, and the County Court of Shelby County by its Chairman, W. R. Harrell against F. W. Davidson, for holding, or attempting to hold, the office, and exercise the duties of a Notary Public for Shelby County, Tennessee.

The petition alleges that F. W. Davidson is a citizen and resident of Shelby County, Tennessee; is twenty-one years of age, and a *feme sole*. She was duly elected or appointed by the County Court of Shelby County on the — day of January, 1892, filed the bond and took the oath required by law, and the same were filed in the County Court of Shelby County as the statutes of the State provide.

On the — day of January, 1892, she was commissioned as such Notary Public by the Governor of Tennessee, under the great seal of State, and has fully complied with all the laws relating to Notaries Public, and when the petition in this cause was filed, was acting as such, and discharging the duties of the office.

The petition charges that she is not eligible to the office because of her sex, but that in every other respect she is fully competent and qualified to fill the office and perform its duties, and that

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she has complied with all the requirements of the statutes.

It prays that the commission issued to her be recalled, and said election be annulled, and for such other relief as may be appropriate.

To this petition defendant demurred, assigning as cause of demurrer that she is not by reason of her sex ineligible to the said office of Notary Public.

This demurrer was sustained by the Court below, and petitioners have appealed to this Court, and have assigned as error the action of the Court in holding that a *feme sole* is eligible to the office of Notary Public.

The cause has been elaborately argued before the Court upon both sides, and has been carefully considered by the Court.

It appears that in many of the States of the Union a woman is eligible to the office of Notary Public, and qualified, under the laws, to execute the duties of the same. This is so in Alabama, California, Connecticut, Florida, Illinois, Iowa, Kansas, Missouri, Michigan, New Hampshire, Nebraska, New York, South Dakota, and Wisconsin.

In many others they have either been held to be ineligible or the question has never been settled. This is so in Arkansas, Arizona, Colorado, Delaware, Georgia, Idaho, Louisiana, Maine, Mississippi, Maryland, Massachusetts, North Carolina, New Jersey, North Dakota, Nevada, Ohio, Pennsylvania, Rhode Island, South Carolina, Virginia, and Vermont.

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The matter depends in each State upon the provisions of the Constitution and statutes.

By the English or common law, no woman, under the dignity of a queen, could take part in the government of the State, and they could hold no offices except parish offices. Robinson's case, 131 Mass., 376; 41 Am. Rep., 239; *Schuchardt v. People*, 99 Ill., 501; 39 Am. Rep., 34.

Although a woman may be a citizen, she is not entitled, by virtue of her citizenship, to take any part in the government, either as a voter or as an officer, independent of legislation conferring such rights upon her. *Minor v. Happersett*, 21 Wall., 162; *Bradwell v. Illinois*, 16 Wall., 130; *Wheeler v. Hall*, 6 Allen, 558; *Jackson v. Phillips*, 14 Allen, 539.

It follows that unless there is some constitutional or legislative provision enabling her to hold office, she is not eligible to the same.

In the absence of any constitutional restriction, the Legislature may confer the power upon her, but it requires a positive provision in one or the other to make her eligible. 19 Am. & Eng. Enc. of Law, 403.

In the several States which we have enumerated, in which women have been held to be eligible to hold the office of Notary Public, she has been made so by some constitutional or statutory provision.

The Constitution of the State of Tennessee is silent upon the subject. Neither in it nor in the statutes of Tennessee is there any enabling provis-

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ion making a woman eligible to hold the office of Notary Public. Under the Act of 1889, Chapter 107, page 213, women are made eligible to fill the office of County Superintendent of Public Instruction. Prior to the passage of this Act, several women had been elected County Superintendents of schools, but the Attorney-general gave an opinion that they were ineligible to hold the office. This opinion led to the passage of the Act 1889, Chapter 107, page 213.

It is true that a woman fills the office of State Librarian, and there is no Act providing therefor; but she is elected directly by the Legislature, which is equivalent to conferring upon her the power to hold the office. But beyond this our Legislature has not gone in the way of positive enabling provisions.

The general statutes relating to offices, and who are eligible to fill the same, are found in the compilation by Milliken & Vertrees, § 936, which provides that "all males of the age of twenty-one years, etc., are qualified to hold office."

The statutes relating to Notaries Public are compiled in the same book as § 2463 and *sequitur*. In each and all these sections of the statutes the masculine pronoun "he" is used, and in none of them is the feminine used.

But it is said that, under the statutes, Milliken & Vertrees compilation, § 48, it is provided that words used in the statutes importing the masculine gender include the feminine, and that the Court

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would be warranted under this provision and from the fact that she may be said to be a citizen, in holding that a female might hold this office. If we should give this statute this broad construction, then we must also hold that a woman is, under our laws, authorized to hold any office, executive, judicial, or otherwise; that she is a qualified voter, and stands in all respects on the same legal footing as males.

We do not feel authorized to make a ruling so utterly at variance with the previous holding of our Courts and the history of our State, in the absence of any legislative provision.

No doubt the General Assembly has the power to make women eligible to this office, if in its sound discretion it see proper so to do, but it has not done so, and we must construe the law and administer it as we find it, and not as we might wish it to be.

We can find no authority, under our present statutes, authorizing a woman to exercise the duties and fill the office of Notary Public, and we are of opinion that she is not eligible to such office under our present statutes.

The judgment of the Court below is reversed, and the cause remanded for further proceedings.

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BANK OF JAMAICA v. JEFFERSON.

(Jackson. May 6, 1893.)

1. BILLS AND NOTES. *Indorsers are joint makers, when.*

Indorsers upon a note, made payable to a particular person or order, and given for a debt of the maker, are liable thereon as joint makers, and without demand, protest, or notice having been made and given, when they indorsed the note before its delivery, and as additional security to the payee.

Cases cited and approved: Harding v. Waters, 6 Lea, 333; Rivers v. Thomas, 1 Lea, 649; Rosson v. Carroll, 90 Tenn., 90-130; 22 How., 341.

2. SAME. *Indorser's liability shown by parol evidence.*

Indorser's liability may be shown by parol evidence to be different from that indicated by the form and order of the indorsements.

3. CHANCERY PLEADING AND PRACTICE. *Proof of complainant's corporate character required, when.*

The averment in a bill that the complainant is a foreign corporation, must be supported by proof, if not admitted by the answer, and, *a fortiori*, if put at issue by a general denial.

Cases cited and approved: Marble Co. v. Black, 89 Tenn., 118-121; Hill v. Walker, 6 Cold., 429; Hardeman v. Burge, 10 Yer., 202; Smith v. Insurance Co., 2 Tenn. Ch., 602; 15 Fed. Rep., 502; 79 Am. Dec., 447; 69 Am. Dec., 81; 71 Am. Dec., 447.

Cited and distinguished: Jones v. State, 5 Sneed, 346, 348; Owen v. State, 5 Sneed, 493, 495; Augusta Manufacturing Co. v. Vertrees, 4 Lea, 75.

4. SUPREME COURT. *Remands for further proof, when.*

This Court, having reversed a meritorious decree in complainant's

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savor for the sole reason that there was no proof of complainant's corporate character, will remand the cause for further proof.

Code construed: § 3889 (M. & V.); § 3170 (T. & S.).

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
W. D. BEARD, Ch.

WASTON & HIRSCH for Bank.

GANTT & PATTERSON and McDOWELL & McGOWAN
for Jefferson.

WILKES, J. The Bank of Jamaica, claiming in its bill to be a corporation under the laws of New York, brought suit in the Chancery Court of Shelby County against J. T. Jefferson, C. C. Glover, and Toof, McGowan & Co., to recover a note for \$1,500 and interest.

The note is as follows:

“\$1,500.00. MEMPHIS, TENN., Dec. 4, 1890.

“Four months after date I promise to pay to the order of F. W. Dunton fifteen hundred dollars at Corbin Banking Co., New York, N. Y.
Value received. J. T. JEFFERSON.”

Indorsed as follows:

“Without recourse. “F. W. DUNTON,

“C. C. GLOVER,

“Toof, McGOWAN & Co.

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"Pay W. H. Porter, Esq., Cashier, or order, for collection account of Bank of Jamaica, Jamaica, Long Island. Wm. S. Wood, *Cashier.*"

Upon the hearing the Chancellor rendered judgment against all the defendants (F. W. Dunton not being sued), and defendants Toof, McGowan & Co. have brought the case to this Court on writ of error, and assign as error that the note shows that Toof, McGowan & Co. are only accommodation indorsers on it, and that they are not principals, and that there is no proof in the record that any demand was ever made upon the maker and that he made default in payment, and that the note was thereupon protested for non-payment, and especially that no notice was ever given to them of such demand and protest for non-payment.

The law is plain that, to hold an indorser liable upon his indorsement made regularly in the ordinary course of business or for accommodation, there must be presentment and demand made of the maker, and protest if payment is not made, and that notice of such demand, failure to pay, and protest, must be given to the indorser, and all these facts must affirmatively appear, and the burden of proof is on the party suing upon the note to show such facts. *Rosson v. Carroll*, 6 Pick., 90-130. This is a universal rule in cases where indorsements are made in the regular course of business.

In the case at bar, however, it appears from

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the testimony of Jefferson, the maker, and Dunton, the payee, which is the only testimony in the case, that the note sued on was made by Jefferson to cover a balance due from him to Dunton; that Dunton lived in New York and Jefferson in Memphis.

Jefferson states that before he sent the note to Dunton, he procured Glover and Toof, McGowan & Co. to indorse it for him, and that they did indorse it merely as additional security to Dunton, the payee, for the money that Jefferson owed him, and to enable Dunton to discount it and obtain the money thereon. Dunton states that he received the note by mail with the same understanding, and, inasmuch as the note was payable to him, he indorsed it without recourse, so as to transfer the legal title without legal liability against himself; that it was transferred before due to the Bank of Jamaica, and that by inadvertence the indorsement made by him was placed above the names and indorsements of the other parties.

Under these facts, which are competent to be shown by parol, Toof, McGowan & Co., as well as C. C. Glover, must be regarded as joint makers with Jefferson of the note, and not simply as ordinary indorsers in due course of trade, and they are liable without any demand, protest, or notice being made. *Harding v. The Heirs of Waters*, 6 Lea, 333, 334; *Rivers v. Thomas*, 2 Lea, 649; *Rey v. Simpson*, 22 How., 341; 2 Parsons on Bills and Notes, 120, 121.

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Again, it is assigned as error that complainant sues as a foreign corporation, and it is insisted that no recovery can be had unless that allegation is sustained by proof, and that no proof was offered on this point in the Court below.

On the other hand, it is insisted that this allegation of the bill is not denied in the answer; that the character in which plaintiff sues is not put in issue by the answer; and that, under a general denial, or the general issue, proof of the character in which the suit is brought is not necessary to be made.

This latter contention is unquestionably correct in actions at law, in which actions, if the plaintiff alleges that it is a corporation, even though it be a foreign corporation, that fact need not be proven unless it is put in issue by a specific denial, and the general issue would not be sufficient, and pleading to the merits would be an admission of the character in which the plaintiff sues. 2 Beach on Private Corporations, 867-869; 4 Am. & Eng. Enc. of Law, 285-6, and notes; *Union Cement Co. v. Noble*, 15 Fed. Rep., 502; *Harrison v. Martinsville Railroad Co.*, 79 Am. Dec., 447; *Arono v. Wedgewood*, 69 Am. Dec., 81; *West Winstead Asso. v. Ford*, 71 Am. Dec., 447; *Marble Co. v. Black*, 5 Pick., 118, 120, 121.

We do not think the cases of *Jones v. State*, 5 Sneed, 346, 348; *Owen v. State*, 5 Sneed, 493, 495; and *Augusta Mfg. Co. v. Vertrees*, 4 Lea, 75, 78, are in conflict with this ruling. The cases of *Jones*

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v. *The State* and *Owen v. The State* are criminal prosecutions, in which greater strictness of proof is required, and the case of *Augusta Mfg. Co. v. Vertrees* was an action of ejectment, in which by statute (M. & V. Comp., 3963) it is provided that, under the general plea of not guilty the defendant may avail himself of all legal defenses.

The rule is different in chancery cases. At law every fact alleged in the declaration, and not denied in the plea, is taken as true. Code, § 2910; M. & V., § 3620. But in chancery every allegation of fact *not admitted, whether denied or not*, must be proved, the failure to admit or deny being equivalent to a denial. *Hill v. Walker*, 6 Col., 429; *Hardeman v. Burge*, 10 Yer., 202; *Smith v. St. Louis Ins. Co.*, 2 Tenn. Ch., 602; Gibson's Suits in Chancery, sec. 457.

The fact that complainant is a foreign corporation is alleged in the bill, and it is a fact material to the right to recover. It is not admitted in the answer, and there is a general denial of all matters not admitted. It should therefore have been proven; and, for the failure to prove this, we are constrained to reverse the decree of the Court below and remand the cause for proof of the corporation, and for further proceedings under the statute. Code, § 3170.

The costs of the appeal will be paid one-half by complainants and the other half by defendants.

Lowenstein *v.* Reynolds.

LOWENSTEIN *v.* REYNOLDS.

(Jackson. May 6, 1893.)

1. MECHANIC'S LIEN. *Subcontractors' furnisher of materials has none.*

A mechanic's lien does not attach, under our statutes, in favor of one who furnishes materials to a subcontractor, to be used by him in the erection of a building.

Code construed: § 2746 (M. & V.); § 1986 (T. & S.).

Acts construed: Acts 1873, Ch. 19; Acts 1889, Ch. 103.

Cases cited and approved; Cole Manufacturing Co. *v.* Falls, 90 Tenn., 470; Stone Co. *v.* Board of Publication, 91 Tenn., 200.

Cited and distinguished: McLeod *v.* Capell, 7 Bax., 196.

2. SAME. *Same.*

And such furnisher of materials to a subcontractor obtains no lien on the building by virtue of a stipulation in the building contract between the owner and the original contractor that all materials should be paid for by the owner's individual checks to the parties furnishing same.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.

W. D. BEARD, Ch.

TAYLOR & CARROLL for Lowenstein.

FRAYSER & HEATH for Respondents.

CALDWELL, J. On the eighth day of July, 1890, Rosa Lowenstein contracted with E. B. Reynolds

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to furnish materials and erect a house upon a certain lot of ground in the city of Memphis.

Contemporaneously with that contract, and as a part of it, Reynolds executed a bond, binding himself to hold Lowenstein harmless against all claims of subcontractors and material-men.

As the work approached completion, numerous demands for money were made upon Lowenstein, by persons claiming liens for work and labor done and materials furnished.

The original bill in this cause was filed to bring all such claimants before the Court in one suit, and to hold Reynolds and his surety liable for a breach of his bond.

Among those several claimants was the Tennessee Brick and Manufacturing Company, which had furnished to R. D. Newport, a subcontractor under Reynolds, brick to the amount of \$312 in value, for use in the construction of the building. With respect to that claim, complainant alleged that she had already paid Newport for the brick, and that she was in no way liable to the Tennessee Brick and Manufacturing Company for them.

That company answered the original bill, and filed a cross-bill, in which it asserted a furnisher's lien on the house and lot for the \$312, and sought to have the same enforced by decree of the Court.

The Chancellor adjudged that the Tennessee Brick and Manufacturing Company had no lien on the property of the original complainant, and dismissed the cross-bill as to her.

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The complainant in the cross-bill has appealed.

The decree is clearly right. Having furnished the brick in question to a *subcontractor*, and not to the original contractor, or to Rosa Lowenstein herself, the Tennessee Brick and Manufacturing Company had no lien upon her property. The statutes provide no lien in such a case. A furnisher of materials to a *subcontractor* is one degree too far from the owner. It is only the person furnishing materials to the owner, or to the original contractor, who is given a furnisher's lien.

In a recent case this Court, speaking through Judge Lurton, held that a person furnishing building materials to a *subcontractor* did not thereby become entitled to a furnisher's lien on the building constructed. *Stone Company v. Board of Publication*, 91 Tenn., 200. That case is exactly in point, and controls this one absolutely. In deciding that case, the Court considered all the legislation on the subject, though only the original act of 1845-6, the enlargement by the Code of 1858, and the amendatory act of 1859-60 were in terms mentioned in the opinion. The Acts of 1873 (Ch. 19), of 1881 (Ch. 67), and of 1889 (Ch. 103), extend the lien and enlarge the remedy for its enforcement in many important particulars, but they do not provide a lien for persons so remote from the owner as the *furnisher of materials to a subcontractor, or as a subcontractor of a subcontractor*.

The original Act of 1845-46, in its second section, made provision for a lien to all persons work-

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ing for or furnishing materials to the original contractor. Code, § 1986 (M. & V., § 2746). Subsequent Acts have not extended the lien to persons further removed from the owner. *Cole Manufacturing Co. v. Falls*, 90 Tenn., 470, 471.

"To justify a construction which would extend this lien to remote contractors, or creditors of subcontractors, the statute should be so plain as to admit of no doubt." 91 Tenn., 204.

The provision in the contract between Lowenstein and Reynolds that *all money for brick-work and materials should be paid by individual checks to parties furnishing the same*, does not make the case any better for the Tennessee Brick and Manufacturing Company. If so intended, that provision could not have had the effect of enlarging the statute, and giving liens to persons not entitled to them by law. The scope of a statute cannot be extended in that way.

Again, if it be said that the object of the parties was to create a lien by contract, then the language employed was wholly inadequate for such a purpose; and, besides, there was no registration of the contract.

The same observations apply with equal force to the suggestion that the bond executed by Reynolds enlarged the rights of persons furnishing materials; but, in reality, neither the bond nor the contract, in any part or provision, contemplated any liens other than those given by statute.

The decision made in the case of *McLeod v.*

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Capell, 7 Bax., 196, is not in conflict with that now made in this case. There the party in whose favor the lien was declared was but a *subcontractor*, and not a subcontractor of a subcontractor, or a furnisher of a subcontractor.

Affirm.

Bassett & Clapp v. Bertorelli.

BASSETT & CLAPP v. BERTORELLI.

(*Jackson.* May 13, 1893.)

1. MECHANICS' LIEN. *Of furnisher of materials to contractor.*

The furnisher to a contractor of materials to build a house has a statutory lien upon the property therewith erected, for their value, although the furnisher relied for payment of his claim upon the contractors' responsibility, and not upon any lien upon the property.

Code construed: §§ 2739, 2746 (M. & V.); §§ 1981, 1986 (T. & S.).

Acts construed: Acts 1881, Ch. 67; Acts 1889, Ch. 103.

Case cited and approved: *Green v. Williams*, *ante*, p. 220.

Cited and distinguished: *Mills v. Terry Mfg. Co.*, 91 Tenn., 469.

2. SAME. *Sufficiency of notice.*

Furnisher's notice to owner, of intention to claim statutory lien upon property for materials furnished to a contractor and used in its erection, if sufficient in other respects, is not bad for failure to give specific description of the materials so furnished and used.

Acts construed: Acts 1889, Ch. 103.

Case cited and approved: *Reeves v. Henderson*, 90 Tenn., 522.

3. SAME. *Service of notice.*

And valid service of such notice may be made by a non-official person.

4. SAME. *When notice may be given.*

Furnisher's notice to owner of intention to claim the statutory lien upon a building for materials furnished to and used by a contractor in its erection, is not premature, under our statutes, when given before the completion of the building, but within thirty days after the completion of the furnisher's contract.

Code construed: § 2746 (M. & V.); § 1986 (T. & S.).

Acts construed: Acts 1889, Ch. 103; Acts 1881, Ch. 67.

Cases cited and approved: *Cole Mfg. Co. v. Falls*, 90 Tenn., 471; *Stone Co. v. Board of Publication*, 91 Tenn., 201; *Shelby v. Hicks*, 5 Snead,

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197; Reeves *v.* Henderson, 90 Tenn., 523; Green *v.* Williams, *ante*, p. 220.

Cited and distinguished: 33 Fed. Rep., 569.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
W. D. BEARD, Ch.

S. J. SHEPHERD and R. M. BEATTY for Bassett
& Clapp.

L. & E. LEHMAN for Bertorelli.

CALDWELL, J. This is a bill by material-men to enforce an alleged furnisher's lien.

The Special Chancellor granted the relief sought, and defendant appealed.

Defendant, Annie Bertorelli, employed Edward Larkin to furnish materials and erect a house upon a certain lot of ground belonging to her, in the city of Memphis. Larkin employed complainants, Bassett & Clapp, to furnish to him certain materials called for in the contract, and necessary in the construction of the house. Those materials were furnished by complainants, and were put into the building by Larkin. A small balance of \$189.99, for materials so furnished by complainants, remains unpaid, and to collect that sum this bill was filed.

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The defendant, through her counsel, insists that the decree against her is erroneous, and should be reversed, upon these grounds: "(1) Because complainants gave credit to Larkin generally, without any understanding that they intended to claim a lien; (2) because it is not shown that notice was given as required by law; (3) because it appears from the bill that the notice which was given was premature."

First.—As to reliance upon personal liability of Larkin, and not upon lien on the property.

Complainants allege, and prove, that they furnished the materials to Larkin for use in the construction of a certain house for the defendant, and that he used them in the construction of that particular house. These facts, without more, gave complainants an inchoate lien upon the property. It was not necessary to the creation of such a lien that complainants should have had an "understanding that they intended to claim" it. Nor is it important that they charged Larkin personally with the debt. They were entitled to both securities, his personal liability and a lien on the property; and their reliance on the one did not impair their right to rely on the other also. They could not be put to an election between the two so long as their debt, or any part of it, remained unpaid.

Nothing is shown to have been said between complainants and Larkin, either about his personal obligation to pay the debt or the liability of the property. That, however, is of no consequence;

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for the lien arose, as a matter of law, from the transaction itself (Code, §§ 1981 and 1986; Acts 1881, Chapter 67, Section 2; Acts 1889, Chapter 103, Section 1; *Green v. Williams*, 92 Tenn., 220; S. C., 21 S. W. R., 520), and his contract for the materials made him personally liable.

There is a marked difference between this case and that of *Mills v. Terry Manufacturing Co.*, 91 Tenn., 469. In that case the claimant was rightfully denied a lien because the materials there in question were furnished to the contractor *on general account, for use in any and all buildings*, and not on special order for use in a particular building, as in this case.

In the conclusion of the opinion in that case, Special Judge Henderson very forcibly said: "Such a lien does not follow a window-blind, like a shadow, as it passes from vendor to vendee, with no contract for its use in a particular building." 91 Tenn., 472.

As already stated, the materials here involved were ordered and furnished for use in a particular building. The heading of the account on the books of complainants is as follows: "Edward Larkin, for Bertorelli House, bought of Bassett & Clapp."

Secondly.—As to the form of the notice, and the manner in which it was given.

Complainants caused their book-keeper to call on the defendant at her home and leave with her a written notice, as follows:

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"MEMPHIS, TENN., Nov. 16, 1889.

"*Mrs. Annie Bertorelli:*

"This is to notify you that we, as material-men, have furnished to your contractor, Edward Larkin, certain material in the erection of your building, corner Arkansas Avenue and Coffee Street, in Shelby County; and bill of material, after giving all just credits, leaves a balance of three hundred and fourteen and $\frac{99}{100}$ dollars (\$314.99); and this is to notify you further that we, as material-men, intend and do rely upon our lien on said building for payment of same, under the statutes of the State of Tennessee. You will hold the above amount, and govern yourself accordingly.

"(Signed)

BASSETT & CLAPP."

At the end of the notice was the following indorsement:

"Sworn and subscribed to before me, this sixteenth day of November, 1889.

"(Signed)

G. R. STRICKLAND, J. P."

Though not so specific with reference to the materials furnished, or so well worded as it might and should have been, that notice is legally sufficient in form and in substance. It gave the defendant the required notification of an intention on the part of complainants to claim a lien on her building, in the construction of which materials furnished by them had been used by her contractor. Acts 1889, Ch. 108, Sec. 1; *Reeves v. Henderson & Co.*, 90 Tenn., 522.

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The leaving of that notice with defendant by a private individual, as the agent of complainants, was, likewise, all that the law required in that respect. It had the same virtue as regular service by an officer would have had.

The notice required by statute is not *process*; it is merely a private instrument of writing. Hence it is in no sense essential that it should be served by an officer.

The difference between the amount of the indebtedness, specified in the notice and that mentioned in the bill, is accounted for by the fact that Larkin made certain payments between the date of the notice and the filing of the bill, thereby reducing the indebtedness to the amount sued for.

Thirdly.—As to the time when the notice was given, and the contention that it was premature.

Complainants allege in their bill, and show in their proof, that they gave the notice on the sixteenth day of November, 1889, within thirty days after the completion of their contract, and "before the building was finished."

The question, then, is, Was the notice premature and inoperative, because given *before* the building was finished? Defendant contends that it was, and complainants that it was not.

The first section of Chapter 118 of the Acts of 1845-46, as enlarged by the Code of 1858, provides that "there shall be a lien upon any lot of ground or tract of land upon which a house

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has been constructed, built, or repaired, or fixtures or machinery furnished or erected, or improvements made, by *special contract* with the owner or his agent, in favor of the *mechanic or undertaker, founder or machinist*, who does the work or any part of the work, or furnishes the materials or any part of the materials, or puts thereon any fixtures, machinery, or material, either of wood or metal." Code, § 1981.

The second section of the same enactment, as carried into the Code at § 1986, is as follows:

"*Every journeyman or other person employed by such mechanic, founder, or machinist to work on the building, fixture, machinery, or improvement, or to furnish materials for the same, shall have this lien for his work or materials, if at the time he begins to work, or furnishes the materials, he notifies the owner of the property, in writing, of his intention to rely upon the lien.*"

The second section of Chapter 67 of the Acts of 1881, amended the latter provision, by adding thereto these words: "Such person shall also have a lien, if such written notice is served on the owner during the progress of the work, or after its completion and before the contractor has been paid." Code (M. & V.), § 2746.

That provision so amended was further amended in 1889 so as to read as follows: "Every journeyman or other person employed by such mechanic, founder, or machinist to work on the buildings, fixtures, machinery, or improvements, or to furnish

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material for same, shall have this lien for his work or material; *Provided*, That within thirty days after the building is completed, or the contract of such laborer, mechanic, or workman shall expire, or he be discharged, he or they shall notify, in writing, the owner of the property on which the building or improvement is being made, or his agent or attorney, if he reside out of the county, that said lien is claimed; and said lien shall continue for the space of ninety days from the date of said notice, in favor of such subcontractor, mechanic, or laborer; and the same shall have precedence over all other liens for such time; *Provided*," etc. Acts 1889, Ch. 103, Sec. 1.

It is readily observed that these statutes provide liens in favor of two general classes of persons: first, for *original contractors* (whether to perform labor or furnish materials), embraced in the words, "mechanic or undertaker, founder or machinist;" and, secondly, for *subcontractors* (whether to perform labor or furnish materials), embraced in the words, "every journeyman or other person employed," etc. The lien in favor of the first class arises upon a special contract with the owner, and that in favor of the second class, upon employment by the original contractor ("such mechanic, founder, or machinist"), and notice to the owner. *Cole Mfg. Co. v. Falls*, 90 Tenn., 470-1; *Stone Co. v. Board of Publication*, 91 Tenn., 201-2.

The provision for the second class has, from time to time, undergone important changes with

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respect to the matter of notice; and each of such changes, in succession, has been intended, manifestly, to better the condition of the subcontractor.

At first, he was required to give the notice when *he began to work or furnish materials*, and, if subsequently given it was unavailing (*Shelby v. Hicks*, 5 Sneed, 197); next, he was allowed to give it at that time, or *at any subsequent time*, before the original contractor had been paid; and now, he may give it as prescribed in the first proviso of the first section of Chapter 103 of the Acts of 1889, and acquire a lien without reference to the question of *payment or non-payment* to the original contractor. *Reeves v. Henderson & Co.*, 90 Tenn., 527.

The question as to whether or not the notice in the case at bar was *premature*, and inoperative because premature, depends upon the construction of that proviso.

The important words are: “*Provided*, That within thirty days after the building is completed, or the contract of such laborer, mechanic, or workman shall expire, or he be discharged, he or they shall notify, in writing, the owner * * that said lien is claimed, and said lien shall continue * * ninety days * * in favor of such subcontractor, mechanic, or laborer.

Three events are mentioned, *after* which the notice is to be given—completion of the building, expiration of the contract, discharge of employe. The first and third of these have no application to the facts of this case, because complainants were

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not discharged, nor did they give notice *after* the completion of the building. The second does apply. The words "such laborer, mechanic, or workman," as used in the proviso, refer to the same class of individuals as do the introductory words of the section, "every journeyman or other person employed by," etc.; and these latter words, as has been seen already, mean *subcontractors*, whether employed to perform labor or furnish materials. It follows, as a necessary consequence, that "the contract" whose expiration is contemplated in the proviso, is the contract of the *subcontractor* or *sub-contractors*, and not that of the *original contractor*.

This construction of the words "such laborer, mechanic, or workman," as used in the first part of the proviso, is rendered the more obvious, perhaps, when they are considered in connection with the subsequent words of the proviso, "such subcontractor, mechanic, or laborer, which are used manifestly to designate the same class of individuals. The lien given to "every journeyman or other person employed by," etc., on condition that proper notice be given, is the same lien which the latter part of the proviso declares "shall continue * * ninety days * * in favor of such subcontractor, mechanic, or laborer." Other words of this inartificially drawn statute might be referred to in justification of the construction herein given, but further reference is not deemed necessary.

The complainants were subcontractors, employed

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by the original contractor to furnish materials for use in the construction of defendant's house. Their "contract" expired on the eighteenth day of October, 1889, and within thirty days thereafter, on the sixteenth of November, 1889, they gave her notice of their intention to rely upon their statutory lien. That notice, though given *before* the completion of the building, was not premature, but in good time.

In *Reeves v. Henderson & Co.*, 90 Tenn., 523, and *Green v. Williams*, 92 Tenn., it was assumed, without discussion or decision, that a material-man might perfect his inchoate lien by giving proper notice within thirty days after expiration of *his contract*, and without reference to the completion of the building. The question there assumed is here decided.

It was held in *Catlin v. Douglass*, 33 Fed. R., 569, and in other cases cited therein, that a material-man's notice, given before the completion of the building, *was premature*; but that holding was made upon the Kansas statute, which authorized notice *only* after the completion of the building, and did not allow it within a specified time after the expiration of his contract, as does our statute. Hence, those cases are not in point.

Affirm, with costs.

Johnson v. Johnson.

*JOHNSON v. JOHNSON.

(Jackson. May 16, 1893.)

1. WILL. *Effect of devise of rents or income of property.*

A bequest of the rents or income of property operates to pass the title of the property itself.

Cases cited and approved: Polk v. Faris, 9 Yer., 241; Morgan v. Pope, 7 Cold., 547; Davis v. Williams, 85 Tenn., 648; Spofford v. Martin College, Oral Opinion, 1889.

2. CHARITABLE TRUST. *Designation of trustee.*

A devise of land in trust for a charitable purpose, to the testator's wife and daughter, with power to nominate and elect their successors and associates from his descendants, who are also authorized to elect associates and successors, and providing that, in case there shall at any time not be as many as two of his descendants willing to take the trust, it shall revert to a designated board, sufficiently provides for the trustees.

Cases cited and approved: Cobb v. Denton, 6 Bax., 236; Gass v. Ross, 3 Sneed, 211; Dickson v. Montgomery, 1 Swan, 347; Franklin v. Armfield, 2 Sneed, 346; State v. Smith, 16 Lea, 665; Heiskell v. Chickasaw Lodge, 87 Tenn., 668; Frierson v. The Church, 7 Heis., 683; 2 How., 126; 3 Pet., 99; 95 U. S., 303; 107 U. S., 172.

3. SAME. *Designation of purposes of trust.*

A devise of land in trust for some charitable purpose, with a preference for something of an educational nature, and a hope that a grand female college may at some time be constructed thereon, but giving the trustees absolute power to divert the property to any other charitable purpose, is too indefinite to be enforced.

Cases cited and approved: State v. Smith, 16 Lea, 670; Dickson v. Montgomery, 1 Swan, 348; Gass v. Ross, 3 Sneed, 211; State, *ex rel.*,

*For a very extensive note on the effect of a secret trust or promise to a testator upon a testamentary gift, see *Gore v. Clarke* (S. C.), 20 L. R. A., 465, while the effect of subsequent incorporation to make valid a gift to an unincorporated association is presented in a note to *Longheed v. Dykeman's Baptist Church and Society* (N. Y.), 14 L. R. A., 410.—REPORTER.

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v. Martin College, Oral Opinion, January, 1888; Reeves v. Reeves, 5 Lea, 644; Rhodes v. Rhodes, 88 Tenn., 637; 125 N. Y., 569; 130 N. Y., 29 (S. C., 27 Am. St. Rep., 487, and 14 L. R. A., 30).

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
W. D. BEARD, Ch.

H. C. WARRINER for Complainants.

SMITH & TREZEVANT for Defendants.

WILKES, J. This is a bill to construe the several items of the will of John Cummings Johnson, deceased.

The testator died July 25, 1892, leaving a widow, Complainant Mary Mildred Johnson, and seven children by a former marriage, and possessed of quite a large estate of both realty and personalty.

The will was written by the testator, and is somewhat inartificially drawn. It consists of twenty-six items, and purports to convey and dispose of all the property of the testator.

The several items submitted to the Chancellor were construed by him, and specific directions were entered in the decree, and a written opinion was filed by him in the Court below.

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The cause has been brought to this Court upon writ of error, and it is assigned as error that the Chancellor erred in his construction of the eighth, seventeenth, and twenty-fourth items of the will.

We have carefully considered these items and the assignments, and are of opinion that there is no error in the construction placed by the Chancellor upon the eighth and twenty-fourth items of the will, and his opinion and decree as to these items is adopted by this Court, and need not be more specifically set out.

The main controversy is in regard to the proper construction of the seventeenth item, which is as follows:

"17. I give and bequeath to my wife, Mary Mildred Johnson, and to my daughter, Lillie W. Johnson, jointly, my 'home lot' of three acres, No. 11, fronting on Poplar Street, east of Dunlap, to hold in trust as below cited, with power to lease and sell the same under the terms of this will, and to nominate and elect their successors and other associates in this trust, from my descendants or from their Protestant husbands or wives, not exceeding five, who may, in turn, elect their associates and successors from my descendants. If at any time in the future there should not be as many as two of my descendants able and willing to take charge of this trust, then it shall revert to a board, consisting of the elders of the several Presbyterian Churches of the city of Memphis, who shall, with the assistance of the Presbyterian

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pastors, nominate from the bankers or business men of their body an executive committee of five, who, with my descendants, shall have full power and control to manage the trust so it will be productive of most good to the greatest number. It has been my desire to see a grand female college located on this lot, and I hope it may yet be accomplished. If the way be clear to that end, the income may be appropriated in that direction; but if not, then it is my desire and wish that the main income from this property, less the amount needed for repairs, taxes, and insurance, shall be used for some charitable purpose, preference always to be given to something of an educational nature, although permissible to appropriate the income in any way it may seem to the trustees to be necessary and most desirable, as they may elect. The property is never to be mortgaged, nor is the income to be pledged for more than three months in advance, and no sale of it shall be made until five years after the termination of the present lease, when it may be sold for re-investment for some scholastic or charitable purpose."

The question presented is whether this is a valid devise to a charitable purpose, and such as can be upheld under our authorities.

The complainants, who are the executors of the testator's will, are also made, by this item, the original trustees of this charity, and in their bill they allege that the item makes a valid devise to

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them as trustees of the property in fee, the net rents and income to be applied to charitable purposes, which are rendered sufficiently definite to be valid.

The adult defendants answer that they have no desire to obstruct the benevolent and charitable intentions of their father if they can be legally carried out, and they join in the request to the Court to construe the item, and determine, as against the minor defendant and devisee, if effect can be given to the devise as a valid charity.

We are of opinion that if the devise is valid, then the item passes the fee in the property for the purposes indicated, the net income from which is to be expended and appropriated by the trustees. While there is no specific devise of the property, yet a devise of the rents and profits and income is in effect a devise of the property itself. *Polk v. Faris*, 9 Yer., 241; *Morgan v. Pope*, 7 Cold., 547; *Davis v. Williams*, 1 Pickle, 648; *Pilcher v. McHenry*, 14 Lea, 88; 1 Jarman on Wills, 152, note; 3 Washburn on Real Estate, 529, 530; *O. M. Spofford, Executrix, v. Martin Female College*, Oral Opinion, January, 1889.

In the case last mentioned, Thomas Martin, of Giles County, had set apart \$30,000 in bonds of the State of Tennessee, the interest to be applied to the founding and operating a female school at Pulaski, Tennessee. After the school had been founded, and successfully operated for a number of years, Mrs. O. M. Spofford, his only daughter and

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residuary legatee, filed a bill, claiming that only the interest upon the bonds was devoted by the will of her father to the school, and that, when the bonds matured and the interest coupons had all been clipped and exhausted, then the bonds or corpus of the fund would revert to her as residuary legatee under the will. The Court below, as well as this Court, held that the gift of the interest of the bonds carried the bonds themselves, and, the fund could not be diverted from the charity.

But the question in this case recurs: Is the devise, as made in the seventeenth item of the will, a valid devise for charitable uses?

Charitable uses are favored in Courts of Equity, and will be supported when the trust would fail for uncertainty were it not for a charity. *Dickson v. Montgomery*, 1 Swan, 348; *Heiskell v. Chickasaw Lodge*, 3 Pickle, 668.

This Court has no disposition to abridge this rule, or recede from it in any way.

A charity will always be upheld, where it is created in favor of a person having sufficient capacity to take as donee; or, if it be not direct to such person, where it is definite in its object, lawful in its creation, and to be executed by trustees. *Franklin v. Armfield*, 2 Snead, 305; *Gass v. Ross*, 3 Snead, 211; *Cobb v. Denton*, 6 Bax., 235; *Frierson v. The Church*, 7 Heis., 683; *Dickson v. Montgomery*, 1 Swan, 348.

There is a broad distinction between a gift direct to a charity or charitable institution already

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established, and a gift to a trustee to be by him applied to a charity. In the first case, the Court has only to give the fund to the charitable institution, which is merely a ministerial or prerogative act; but in the latter case the Court has jurisdiction of the trustee, as it has over all trustees, to see that he does not commit a breach of his trust or apply the funds in bad faith to purposes foreign to the charity. 2 Perry on Trusts, Sec. 719.

Hence, there must be either—

1. A trustee capable of taking, and a definite, legal purpose declared.
2. A trust so definite and well defined that it can be enforced and executed, if necessary, by a Court of Chancery.

The Chancellor was of opinion that provisions of the will providing for trustees of this charity were sufficient, and in this we think he is well sustained by authority.

An executor may act as such trustee. *Cobb v. Denton*, 6 Bax., 236; *Gass v. Ross*, 3 Sneed, 211.

Or third persons may be such trustees. *Dickson v. Montgomery*, 1 Swan, 347; *Franklin v. Armfield*, 2 Sneed, 346; *State v. Smith*, 16 Lea, 665.

Or the Court may appoint a trustee if the trusts are definite and valid. *State v. Smith*, 16 Lea, 665; *Vidal v. Girard*, 2 Howard, 126, 128; Perry on Trusts, Sec. 722.

Or a corporation to be created after the death of the testator may be such trustee. *Inglis v.*

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Sallon Mug Harbor, 3 Peters, 99; *Ould v. Washington Hospital*, 95 U. S., 303; *Russell v. Allen*, 107 U. S., 172; *State, ex rel. Duncan, v. Martin College*, Oral Opinion.

The real difficulty in the devise is the uncertainty of the beneficiary and the extreme discretion and power vested in the trustees.

Unquestionably, under the English law and the law relating to charitable trusts prevailing in many States of our Union which have adopted the doctrines of the English law, this trust would be good. The doctrines of *parens patriæ* and *cy pres*, as recognized in the English law, have never obtained in Tennessee. Only those powers which in England were exercised by the Chancellor by virtue of his extraordinary as distinguished from his specially delegated jurisdiction, exist in our Chancery Court. *Green v. Allen*, 5 Hum., 170; *Dickson v. Montgomery*, 1 Swan, 348.

Nevertheless, the Courts will sustain a charity when the plan and scheme for its management is left to the discretion of trustees, and will, if necessary, formulate a scheme for the conduct of the charity, or uphold the plans and schemes which the trustees, in their discretion, may adopt and formulate, and prevent any interference therewith. *The State v. Smith*, 16 Lea, 670; Perry on Trusts, Secs. 744, 700; *Dickson v. Montgomery*, 1 Swan, 348; *Gass v. Ross*, 3 Snead, 346; *State, ex rel. T. J. Duncan, v. Martin Female College*, Oral Opinion, January, 1888.

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In the case last named a bill was filed in the name of the State of Tennessee, on the relation of the Rev. T. J. Duncan, a Presiding Elder in the Methodist Episcopal Church, South, against the trustees of Martin Female College, an educational charity in successful operation at Pulaski, Tenn., seeking to set aside the charter of the college, remove its trustees from office, and enjoin the operation of the school, because it had been founded by Thomas Martin, a prominent Methodist layman, and for years had been recognized and patronized by the Tennessee Conference, and yet the trustees had not conducted it as a sectarian or denominational school, but had placed in charge of it principals of different tenets of faith. The Court held that, in the absence of specific instructions in the will of Thomas Martin, the trustees had the power and discretion to place in charge of it such persons as they might deem best, and their discretion could not be controlled by any other persons or organizations.

In the case at bar we have a specific and definite property designated and set apart by the testator, and conveyed to trustees whose identity is fixed and whose succession is provided for. It is apparent also that it was the earnest desire of the testator to devote this property to charitable purposes and to none other, the principal or corpus to be preserved and the income to be consumed for the purposes of the charity, and in such man-

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ner as might be productive of the greatest good to the greatest number.

We think it is also evident that the testator had a primary and a secondary object, the former being to found a charity, and the latter being that (as a matter of preference) the charity should be educational. It is evident also that the testator had the utmost confidence in the trustees selected—to wit, his wife and daughter; and he gave to them unlimited power and discretion, not only as to the kind or character of the charity, but also as to the plan for its administration.

In all cases of charities founded by wills, broad discretion and ample powers must necessarily be conferred upon the trustees, inasmuch as the testator is attempting to provide for contingencies which will arise after his own death, but at the same time this power and discretion must not go to such extent as that the objects to which the fund is to be devoted, and the kind and character of the charity, will depend not upon the will and directions of the testator, but upon the choice and preference of the trustee.

In *Read v. Williams*, 125 N. Y., 569, it is said: "That cannot well be said to be a disposition by the testator's will with which the testator has had nothing to do except to create an authority in another to dispose of the property according to the will of the donees of the power."

The important question which primarily arises is whether the object of the trust, and who are

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to be its beneficiaries, depends upon the will of the testator or the choice of the trustee, and is there any one who could demand of the trustee the benefits of the trust because it was made for his benefit, and others of his class, and, if refused, could compel its performance?

In the case of *Tilden v. Green*, 130 N. Y., 29, also reported in American State Rep., Vol. 27, 487, and in 14 Lawyers' Reports Annotated, page 30, the devise in trust under the thirty-fifth and thir-ty-ninth items of the will of Samuel J. Tilden, was passed upon.

Under these items, property was devised to trustees to be held for two lives in being, with re-quests that they procure an act of incorporation, to be known as the Tilden Trust, with capacity to establish and maintain a free library and reading-room in the city of New York, and to promote such scientific and educational objects as the trustees might more particularly designate, and authorized them to convey such property to such corporation when formed, and declared that in case it was not formed, or, if from any cause or reason they should deem it inexpedient to convey to such corporation, then they were directed to apply it to the use of such charitable educational or scientific purposes as in their judgment would render such property most widely and substantially beneficial to the interests of mankind.

It was said in that case the devise does not designate any beneficiary, but, on the contrary, leaves

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it to the discretion of the trustees whether or not they will or will not convey to the corporation. Hence there is not, and cannot be, any person, natural or artificial, who is or will become entitled to the execution of the trust in his favor. The conclusion of the Court was that the bequest could not be maintained, because of the complete discretion vested in the trustees whether they would give it or not to the beneficiary suggested. A charter was actually obtained, and the property was in fact conveyed by the trustees to the corporation thus created, before the suit was brought, but the Court held that the invalidity of the trust could not be cured by any thing done by the trustees toward its execution.

It is also held in that case that a trust without a beneficiary who can claim its enforcement, is void, and this objection is not obviated by the existence in the trustees of a power to select a beneficiary, unless the class of persons in whose favor the power may be exercised has been designated with such certainty that the Courts can ascertain who were the objects of the power, and when the beneficiary is not designated in the will, such beneficiary cannot be designated by the trustees in pursuance of a discretion vested in them by the will. It is further said, no trust is enforceable unless there is some person or class of persons who have a right to a part or all of the designated fund, and can demand its conveyance to them, and, in

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case of refusal, can sue the trustees in equity and compel compliance with the demand.

In the case at bar the power and discretion vested in the trustees is more extensive than in the Tilden will case. Here there is a mere preference expressed for an educational charity by the testator, and a hope that a grand female college may at some time be located on the lot; but absolute power is given to the trustees, at their discretion, to divert the property to any other charitable purpose, even over the preference of the testator himself as expressed in his will. Under this power and discretion, the trustees might at will devote the property to any charity, whether educational, religious, or eleemosynary, and they could at will change and alter the direction in which the charity should flow.

Under this broad discretion and power, the trustees might, instead of a female school, establish a public library or a lecture-room, or a church or woman's home, or any other charity, and if either of these should be selected by these trustees as the object of this devise, certainly it could not be said they had exceeded their powers and discretion, and if either should be established, it would not be because of directions in the will of the testator, but from choice and preference on the part of the trustees. We are constrained to hold that such a charitable devise cannot be enforced, and is invalid. *Reeves v. Reeves*, 5 Lea, 644; *Rhodes v. Rhodes*, 4 Pickle, 637.

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The Chancellor decreed that the devise must fail, and the property must pass under the nineteenth clause, which he construed to be the residuary clause of the will. As no point or contest is made upon this part of his decree, we are content to affirm his holding on this point. See also *Reeves v. Reeves*, 5 Lea, 650.

The decree of the Chancellor is in all things confirmed, and the costs will be paid by complainants out of the estate.

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*CAZASSA *v.* CAZASSA.

(Jackson. MAY 18, 1893.)

1. DEED. *Delivery not proved, when.*

No intention to deliver either of two deeds, which remained, unregistered but acknowledged, in the grantor's possession, unknown to the grantee, until death, and were found among some old papers, and not among his valuable ones, is shown, where they were made at the same time to a twelve-year-old son of the grantor, and one expressly provided for future delivery, while the other, although silent on that point, included the family residence, and no change of possession or control and use of the property was ever made.

Case cited and distinguished: *Davis v. Garrett*, 91 Tenn., 147.

2. LIFE INSURANCE. *Chargeable to child as an advancement, when.*

Insurance taken out by a father, upon his own life, in the name of a child, or in his own name and transferred to the child, and paid for by the father, who retained possession of the policies until his death, constitutes, in the absence of clear and convincing proof to the contrary, an advancement, for which the child must account in the settlement of the father's estate.

Cases cited: *Yancy v. Yancy*, 5 Heis., 357; *House v. Woodard*, 5 Cold., 200; *Morris v. Morris*, 9 Heis., 817; *Cawthorn v. Coppedge*, 1 Swan, 487; *Johnson v. Patterson*, 13 Lea, 626; *Aden v. Aden*, 16 Lea, 453; *Williams v. Williams*, 15 Lea, 438; *Mason v. Holman*, 10 Lea, 315; *Steele v. Frierson*, 85 Tenn., 430.

3. SAME. *How valued as an advancement.*

And such insurance is valued to the child who receives it as an advancement, at the net amount due and realized from the policies after the father's death.

Cases cited: *Moore v. Burrow*, 89 Tenn., 104; *Burton v. Dickinson*, 3 Yer., 110; *Brown v. Dortch*, 12 Heis., 740; *Andrews v. Andrews*, 7 Heis., 251; *House v. Woodard*, 5 Cold., 200; *Haynes v. Jones*, 2

* Reported in 20 L. R. A., with the remark that this case, so far as it touches life insurance as an advancement, is very nearly one of first impression, and no authorities have been found other than those cited in the opinion.—REPORTER.

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Head, 373; O'Neal *v.* Breecheen, 5 Bax., 605; 13 B. Monroe, 528; 27 Md., 693; 14 Ala., 443; 10 S. C., 110 (S. C., 30 Am. R., 37).

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
W. D. BEARD, Ch.

MALONE & MALONE for Complainant.

JULIUS A. TAYLOR for Defendant.

[WILKES, J. This bill is filed by the widow and younger son of Frank Cazassa against the elder son of Frank Cazassa and his guardian. The objects of the bill are:]

First.—To set aside two deeds made by the father in his life-time to the elder son, upon the ground that they were never delivered, and because they are a fraud upon the rights of the widow to dower and homestead in the lands of her deceased husband.

[*Second.*—To declare certain insurance moneys, amounting to about \$14,000, arising from four different life policies, together with the premiums paid thereon, to be an advancement to the elder son, for which he must account upon the settlement of his father's estate.] All of these life policies were taken out by the father, one of them

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being originally payable to his estate, and afterwards transferred to the elder son, and the others taken out originally in the name of and for the benefit of the elder son.]

The two deeds were executed by the father on the same day—to wit: May 15, 1889—were written by H. Clay King, then an attorney of the Memphis bar, and acknowledged on the sixteenth day of May, before a Notary Public. One purports to convey certain property to the elder son, situated on De Soto Street, in Memphis, and is an ordinary deed, while the other purports to convey to the same son, a lot on Beale Street, in Memphis, but provides that “*the title to the same is to vest in the donee on a formal future delivery of the deed, no delivery being intended at the present time.*”

Neither deed was ever registered, but both remained in the father's possession until his death, in November, 1892.

The father continued in the possession of the property embraced in both deeds until his death, collected the rents, paid the taxes, took out fire insurance, and made leases and rental contracts for the property, in the same way and manner as before the deeds were executed, and always in his own name. The fire policies contained the clause usual in such policies that, if the interest of the assured was less than that of owner in fee, or if he was not sole owner, or if the title was encumbered, then the policies were to be utterly void.

He never mentioned the fact of having made

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the deeds to his wife or to any of his friends, nor to the donee, so far as the record shows, and always spoke of the property as his own. It appears, however, that he was quite reticent in regard to all his business matters.

The elder son was about twelve years of age, and the younger about nine years of age, when the deeds were made. The former is shown to be a bright, intelligent boy of good memory. He was not examined as a witness, though tendered by the mother for that purpose.

By the mother and two other ladies it is proved that, after his father's death, the elder son stated, in answer to questions by his mother, that his father had never given him any papers, and had never shown him any.

While the father was in his last sickness, and some three or four days before he died, he said to his wife that he had some old papers in his possession with which he was not satisfied; that he did not wish them to stand or remain good, and that he intended to write a will; that he wished to provide well for her, and spoke feelingly of how faithfully she had nursed him.

After the father's death, the two deeds were found in his iron safe, in a separate envelope, tied up, among some old bills and receipts. His fire insurance policies, which seem to have been his only other valuable papers, were in a separate package.

The Beale Street property is worth about \$15,000,

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the DeSoto Street property about \$25,000. Besides this, the estate has two farms worth about \$5,000, with an incumbrance on one of \$2,350. The personal property amounts to \$5,000, and the debts against the estate amount to \$5,000.

[On the trial the Chancellor held] that both deeds were invalid and inoperative because never delivered, and set them aside. As to the insurance money, he held that [a] policy for \$5,000 in the Mutual Benefit Life Insurance Company was an advancement, but that the other insurance was not an advancement.

This \$5,000 policy was in what is styled an "old line company," while the others were certificates in certain benevolent orders. The former was paid up, and had originally been issued in favor of the father's estate, and subsequently transferred to the eldest son, while the benefit certificates were taken out in the name of the elder son, and for his benefit.] The transfer of the paid-up policy and the issuance of the benefit certificates were about the same date as the two deeds.

Both parties have appealed from the decision of the Chancellor, and have assigned errors.

[For complainants, it is insisted that the Court should have charged all the insurance and all the premiums paid thereon as an advancement against the elder son, for which he should account in the further settlement of his father's estate.]

For defendants, it is insisted that the Court should have held the deeds valid and operative,

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and that the eldest son should not have been charged with any of the money derived from life insurance as an advancement.

The case has been ably argued and very forcibly presented by counsel on both sides.

For defendants it is insisted that the acts done by the father were sufficient to show delivery of the deeds, that both were executed, and, at the same time, that they were acknowledged before a Notary Public; that a manual delivery was not necessary; that with a child of such tender years such delivery was impracticable. It is further urged that, both deeds being executed at the same time, one providing for future delivery as to the Beale Street lot, and the other conveying the DeSoto lots, being silent as to delivery, was a convincing fact that, as to the latter in any event, it was intended the deed should take immediate effect, and as to that there was an actual present delivery.

On the other hand, it is urged with great force that no delivery of either deed was ever, in fact, made, nor was there any intention at any time to make an actual present delivery; that if any intention to deliver ever existed in the mind of the father, that he abandoned it; that he continued in the use of the property just as he did before the deeds were made; that he collected rents, made contracts, took out insurance, paid taxes on the property in his own name, and treated the property as his own, and that the deeds, when

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found, were not among his valuable papers, but among his old bills and receipts.

Many authorities bearing upon the question of delivery are cited by both parties, and the case of *Davis v. Garrett*, 91 Tenn., 147, is specially urged by defendants as controlling.

In that case it was held that actual manual delivery to an infant of seven years of age was not absolutely necessary, and a formal delivery, under such circumstances, would have been so extremely formal as to be farcical.

That case, however, differs broadly from this, in that the deed in that case was delivered *by the father for registration, was actually registered, and was never again in the father's possession.*

Looking at all the facts disclosed in the record, and the situation and surroundings of the parties, we are of opinion that neither of these deeds was ever delivered, nor was there ever an actual present intent to deliver them.

It would not be reasonable to suppose that the father intended to make a deed to take effect "*in præsenti*" to the DeSoto property, upon which the residence in which he and his family were residing was situate, and the deed to the Beale Street property provides, on its face, for future delivery, and against any vesting of title until such delivery could be made. We can see no evidence of delivery at any date subsequent to the making of the deeds, or of any intention to make such delivery; but the

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facts, so far as they go, negative the idea of any delivery.

That the father never mentioned the making of the deeds to his wife, or to any of his friends; that he continued to use the property as before, paying taxes, making rental contracts, and receiving the rents, taking out insurance in his own name; that the deeds, when found, were not among his live and most valuable papers, but among his old bills and receipts—all these facts negative the idea of any delivery, or of any present intention to deliver.

As to the insurance money, a new and novel question is presented: Whether insurance taken out by the father in the name of a child, or taken out in his own name and subsequently transferred to a child, shall be treated as an advancement to that child, for which he must account in the settlement of his father's estate; and, if so treated, then for what amount must such child account?

We have been cited by counsel to but one case bearing upon the question, and it is admitted that no other case can be found. The case cited is *Rickenbacker v. Zimmerman*, 10 South Carolina Reports, 110 (reported also in 30 American Reports, 37; and cited in American and English Encyclopedia of Law, Vol. I., page 217). In that case it was held that the value of the insurance at the time the policy was taken out and the first premium paid, together with all premiums subsequently paid, must be treated as an advancement.

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In our own books we find nothing directly upon the question. We have a general statute providing for absolute equality in the division of estates, and for the collation of advancements. M. & V. Code, §§ 3280, 3281.

An advancement is defined to be a gift by a parent to a child by anticipation, in whole or in part, of what it is supposed the child will be entitled to on the death of the parent.] *Yancy v. Yancy*, 5 Heis., 357; *House v. Woodard*, 5 Cold., 200; *Morris v. Morris*, 9 Heis., 817; *Cawthorn v. Coppedge*, 1 Swan, 487; and other cases using substantially the same language.

In the South Carolina case referred to, it is said that it would be a difficult matter to frame such a definition of the meaning of the word "advancement" as would cover every possible case, but that certain elements are absolutely essential—that is, the property given must have been a part of the estate of the ancestor which, but for the gift, would pass to the heir or distributee on his death, or it must be something purchased with the funds of the father in the name of and for the benefit of the child.

While we would not adopt this as a critically correct definition in all cases, we think there is no error in it, as applied to the facts of this case.

Certainly a parent can purchase property, real or personal, and take title to his child if he chooses, with a view and for the purpose of mak-

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ing it an advancement to such child, and it would be no objection to its being so treated that the property thus advanced had not previously belonged to the estate of the father. Property thus acquired may constitute an advancement as well as property previously owned by the father.

[In this case the insurance was purchased by the funds of the father. It was an investment of the money paid as premium by him for the benefit of his son; it was the setting apart and investing of that much of his property, which would otherwise have accumulated in other forms and gone to his distributees just as much as if he had invested the same in some stock or bond for the benefit of his child; and if we add the feature that the father should retain the possession of the bond or stock until his death, the analogy would be complete.

It is true the proceeds of a life policy are by statute protected from seizure for the father's debts, but this in nowise bears upon the matter now under consideration.

The premiums being thus invested in the policy, the proceeds of the same are an advancement to the child in the absence of any thing showing that the parent intended it to be a gift and not an advancement.

As a matter of course it is competent for the father to *give* the policy to his child *as a gift*, and not as an advancement, as it would be for him to *give* any other property that he might desire, but in the absence of clear, convincing proof to the

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contrary, the property will be treated as an advancement, and not as a gift.] *Morris v. Morris*, 9 Heis., 817; *Johnson v. Patterson*, 13 Lea, 626; *Aden v. Aden*, 16 Lea, 543; *Williams v. Williams*, 15 Lea, 438; *Mason v. Holman*, 10 Lea, 315; *Steele v. Frierson*, 1 Pick., 430.

[The mere fact that the policy is taken in the name of the son is no more evidence that it was intended as a gift instead of an advancement than would be the placing of title to real or personal property in the name of the son. All advancements are gifts, but there may be a gift that is not an advancement if not so intended when made by the parent.

The next question presented is at what sum the insurance should be charged, treating it as an advancement.

In the South Carolina case cited, it was held that the son should be charged with the value of the policy at the time it was taken out and the first premium paid, together with all premiums subsequently paid added to that value, but without interest. This ruling was, however, based upon the statute of South Carolina relating to advancements, which provides that the property advanced shall be estimated at its value at the ancestor's death, but so that neither the improvement of real estate nor increase of personal property shall enter into the computation.

The rule in Tennessee is that advancements shall be charged at their value *when made*.] *Burton v.*

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Dickinson, 3 Yer., 112; *Brown v. Dorch*, 12 Heis., 740; *Andrews v. Andrews*, 7 Heis., 251; *House v. Woodard*, 5 Cold., 200.

Under this rule, we think the property should be charged at its value at the time it comes into the possession and beneficial enjoyment of the child to whom it is given.

The idea is correctly set forth in the case of *Hook v. Hook*, 13 B. Monroe, 528. In that case, a father conveyed to certain of his children lands and slaves, reserving a life-estate in himself. The Kentucky statute prescribes the same rule that is recognized in Tennessee, that all advancements shall be estimated at their value when made, and the Court construed this to mean that the advancement should be deemed to be made at the time it is completed, by the actual possession and enjoyment of it when the life-estate fell in.] See also *Clark v. Wilson*, 27 Md., 693; *Wilkes v. Green*, 14 Ala., 443.

Substantially the same idea is held in *Moore v. Burrow*, 5 Pickle, 104. In that case land was given by parol in 1856, and the donee went into immediate possession. This parol gift was ratified by a conveyance in 1859, and the question was whether the advancement should be valued at the time of the parol gift or when the deed was made, and the Court held that the value at the time of the parol gift, and beneficial enjoyment thereunder, was the proper date.] See also *Haynes*

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v. Jones, 2 Head, 373; O'Neal v. Breecheen, 5 Bax., 605.

We consider this much the better rule, inasmuch as the child gets no possession or beneficial enjoyment until the father's death. In the meantime, if the policy has been allowed to lapse, the child will not be chargeable with any thing on account of it. Again, it is said that if any thing is charged as an advancement, it should be simply the amount of premium paid, without interest, but the same rule applied to any other property would make amount paid for the property advanced the criterion of value, instead of what it is actually worth or what may be its real outcome.

We are of opinion, therefore, that the eldest son should be charged, as an advancement, with the net amounts received by him upon all the policies after his father's death. We can see no reason why he should not be charged with the amounts received on the certificates in the beneficial orders as well as that upon the old line policy, nor with the amounts received upon the policies not paid up as well as that paid up in the father's life-time. The final proceeds and outcome of each is earned by, and is the result of, the premiums invested by the father out of his own means, which would otherwise, upon his death, have gone to his distributees.

The decree of the Chancellor as to the real estate is affirmed, and, as to the insurance money, is modified as herein indicated, and the cause is

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remanded for such further proceedings as may be desired.

The costs of the appeal will be paid by the defendant's guardian out of the trust funds in its hands.

Cary-Lombard Lumber Co. v. Thomas.

CARY-LOMBARD LUMBER COMPANY v. THOMAS.

(Jackson. May 20, 1893.)

1. HUSBAND AND WIFE. *Husband's liability.*

The husband is not personally liable, in the absence of express contract, for materials furnished to the wife's contractor for use in the erection of buildings upon her lands, held as a general estate, although he may have acted as her agent in the transaction with the contractor.

2. MECHANICS' LIEN. *Service of furnisher's notice; proof of.*

An officer's return indorsed upon the notice showing service, constitutes legal and sufficient proof of service of the required statutory notice to be given to the owner of property by the furnisher of materials to a contractor, in order to perfect the furnisher's lien for materials used in the erection of buildings upon the property.

Acts construed: Acts 1889, Ch. 103.

Case cited and distinguished: Bassett & Clapp v. Bertorelli, *ante*, p. 548.

3. FOREIGN CORPORATIONS. *Contracts of, illegal and not enforceable, when.*

The contracts of a foreign corporation, entered into in this State since Acts 1891, Ch. 122, are, as to such corporation, illegal and void, conferring upon it no rights or remedies enforceable, at its suit, in our Courts, if the corporation had not, before making such contracts, complied with the provisions of said Act, which prohibit foreign corporations, under the penalty of a misdemeanor, to do any business or acquire any property in this State until they have filed their charters in the office of Secretary of State, paying the required privilege tax therefor, and caused abstracts to be registered in the counties where they carry on their business.

Acts construed: Acts 1877, Ch. 31; Acts 1891, Ch. 122.

Cases cited and approved: Stephenson v. Ewing, 87 Tenn., 46; Haworth v. Montgomery, 91 Tenn., 16; State v. Phoenix Ins. Co., *ante*, p. 420.

4. SAME. *Same. Illegality, how shown.*

And, in such case, the foreign corporation will be repelled from our Courts, if the illegality of the transaction, though not pleaded, appears in the proof.

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5. SAME. *Same. Presumption.*

And, where it appears from the proof that a foreign corporation complied with said Act at a certain date, but after the illegal transaction, no presumption will be indulged in its favor of compliance at any earlier date.

6. MECHANICS' LIEN. *Removal of materials.*

The rules are re-affirmed, as laid down in Cole Mfg. Co. v. Falls, 90 Tenn., 468, defining, regulating, and limiting the furnisher's right to remove materials used by a contractor in the erection of a house upon the property of a *feme covert*.

7. SAME. *Same.*

The furnisher's remedy by removal from the building of his materials used by a contractor in its erection, may be pursued, in cases where it exists, without attachment or previous judgment and execution for his debt.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
W. D. BEARD, Ch.

L. W. FINLAY for Lumber Co.

SMITH & TREZEVANT for Thomas.

WILKES, J. Mrs. Flora L. Thomas, a *feme covert*, was the owner of a lot, holding a fee-simple title thereto as her general estate. Desiring to improve it as a home, she, through her husband as her agent, and personally, entered into a contract with one Marcus Miller to build her a dwelling upon the lot at a cost not exceeding \$2,000.

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Miller put up the frame-work of the house, and did some other work upon it, but left it in an unfinished condition, after having drawn \$500 of the contract price, and Mrs. Thomas and her husband were compelled to expend very much more than the price agreed upon in order to have the same completed.

The Cary-Lombard Lumber Company furnished material and lumber in the construction of the house, amounting to about \$1,249.

The Bluff City Brick Manufacturing Company furnished brick for the house to the amount of about \$80.50.

These bills for materials not having been paid, the Bluff City Manufacturing Company gave notice to Mrs. Thomas that it would claim a lien upon the building, and had the same registered. The Cary-Lombard Lumber Company gave notice to Mr. and Mrs. Thomas that it would claim the benefit of the second section of the Act of 1889, providing for the removal of lumber and other materials furnished for buildings upon property belonging to a married woman, in the event they were not paid for.

Suit was thereafter brought to enforce the liens and remedies given by the Act, and also to hold E. R. Thomas, the husband, personally liable for the debts, upon the ground that Marcus Miller was simply his agent in the purchase of the materials.

On the hearing, the Chancellor was of opinion

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that the proof did not warrant any personal judgment against the husband, and denied that relief, and dismissed the bill as to the husband. He also denied any relief whatever to the Bluff City Manufacturing Company because of insufficiency of the notice given, but gave judgment that the Cary-Lombard Lumber Company was entitled to remove from the premises of Mrs. Thomas such property and materials as it had furnished, and as had gone into the construction of the house and had not been paid for, and referred the matter to the Master to report what materials had been so furnished and used and not paid for, and whether the same could be removed from the premises without serious damage and injury to the remainder of the house.

Pending this reference, the Cary-Lombard Lumber Company and the defendants each appealed, and, the bill being dismissed, as to the Bluff City Manufacturing Company, no appeal was prayed by it, so that the only contention and controversy in this Court is between the Cary-Lombard Lumber Company and the defendants.

The lumber company insists that the Chancellor erred in not giving judgment in its favor against the husband, E. R. Thomas, and the defendants insist that the Chancellor should not have decreed the removal of any of the material from the lot or building, and should have granted no relief against the property of Mrs. Thomas.

We have carefully examined the record upon

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the facts of the case. While the evidence is quite conflicting and contradictory, we are of opinion that the weight of the consistent, reliable testimony is very decidedly in favor of the Chancellor's finding, and we affirm the decree, so far as it declines to hold the husband, E. R. Thomas, individually liable for the debt sued on.

As to the relief sought against the property, it is insisted that there is no sufficient legal proof of the service of the notice required by the second section of the Act of 1889. The notice is copied in the record, together with the indorsements thereon, and it is conceded that it is sufficient in substance and form, but it is contended that there is no legal evidence of its service upon Mrs. Thomas. It is claimed that such a notice is not process, but simply a private paper, and that, in order to prove the service of such notice, the testimony of the party making the service must be taken as the testimony of any other witness to prove any other fact material to the controversy. In this case the notice was served by a Deputy Sheriff, and his return of service is indorsed upon the notice, and his affidavit, made out of Court and before a Notary Public, of the fact of service is also indorsed upon the notice or a paper accompanying it. This, we think, is sufficient. While the affidavit was unnecessary, the return of the officer was, in itself, all that was necessary to make legal evidence of service, and has all the verity and effect of such an indorsement upon any

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process. The return of the officer indorsed upon the notice is sufficient proof of service. There is nothing in the case of *Bassett & Clapp v. Bertorelli, ante*, p. 548, in conflict with this holding.

Again, it is insisted that complainant is not entitled to any relief because it is a foreign corporation, and, at the time the lumber was furnished and contracts entered into, it had not complied with the provisions of the Acts of 1891, Ch. 122, and of the Acts of 1877, Ch. 31, prescribing the terms upon which foreign corporations may transact business in Tennessee.

These Acts require that any foreign corporation, desiring to own property or carry on business in this State, of any kind or character, shall first file in the office of the Secretary of State a copy of its charter, and cause an abstract of the same to be recorded in the office of the Register in each county in which such corporation desires or proposes to carry on its business, or to acquire or own property, as required by Section 2 of Chapter 31 of the Acts of 1877; and it shall be unlawful for any foreign corporation to do or attempt to do any business, or to own or to acquire any property in this State, without having first complied with the provisions of the Act, under penalty of a fine of not less than \$100 nor more than \$500, at the discretion of the jury.

It appears from the record that the charter of the Cary-Lombard Lumber Company was registered in the office of the Secretary of State on the twenty-

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fifth of July, 1891, and an abstract of the same was registered in Shelby County on the twenty-eighth of July, 1891, at 1:45 P.M. It does not appear that such registration was made at any prior dates.

This Act of 1891, Chapter 122, has, by this Court, been held to be a valid and constitutional law. *State v. Phoenix Fire Insurance Co., ante, p. 420* (Vol. 21 S. W. Rep., page 893). After this Act went into effect, March 21, 1891, by its terms and provisions this foreign corporation was not authorized to do any business, or to own any property in Tennessee until the provisions of the Act were complied with. It could, therefore, after that Act was passed, own no property and make no legal contract in Shelby County, where this property was situated, until the abstract or memorandum was recorded in the Register's office of that county, which, as before stated, was the twenty-eighth of July, 1891. All contracts made by it and all business transacted by it in Shelby County between these dates were illegal, and no rights of property or of action could arise out of the same.

It follows that such company can have no remedy growing out of any transaction between these dates in Shelby County, and can recover upon no contract, express or implied, entered into between these dates, and is not entitled to retake or recover any materials or lumber furnished within these dates. *Stevenson v. Ewing*, 3 Pick., 46; *Haworth v. Montgomery*, 7 Pick., 16.

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The illegality of these transactions is not set up in the pleadings, but only appears from the proof, and the Chancellor held that, in this condition of the case, he would not refuse complainant relief upon the presumption that no abstract had been recorded prior to July 28, 1891. In this we are of opinion the Chancellor was in error.

The Courts will deny any relief upon any illegal contract or transaction, whenever the illegality is made to appear, whether in the pleadings or proof, and will repel the party guilty of the illegality from the Court whenever the fact appears.

In order to entitle the complainant to any relief, it must show affirmatively that it had complied with the law; until that is done, all its transactions are illegal. The burden of proof being upon it, the Court can presume nothing in its favor, and can only hold such of its contracts enforceable as it shows were made after it had complied with the law enabling it to make a valid contract, and to transact business.

The decree of the Chancellor in favor of the complainant lumber company, will be reversed and modified, and the cause remanded to the Court below, with instructions to ascertain what lumber and materials were furnished by complainant on and after July 28, 1891, and used in the construction of the buildings upon defendant's premises.

The complainant will have the right to remove all such material as has not been paid for under the rules and restrictions laid down in *Cole Manu-*

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facturing Co. v. Falls, 6 Pickle, 468, unless the defendants pay therefor their actual value. The cost of the appeal will be paid by the complainant, Cary-Lombard Lumber Company.

OPINION ON REHEARING.

WILKES, J. Upon petition to rehear, it is earnestly pressed upon the Court that it was not intended by the Legislature that, by declaring the doing of any business to be unlawful, it should follow that any contract made in contravention of it should be void; that it was not intended to prohibit the business on the ground that it was immoral or against public policy, or because it was desired to suppress the same, and submitting that the Courts should enforce the contracts of foreign corporations who did not comply with the Act, leaving the State to compel a compliance with the laws by enforcing the penalty for failure. This identical view of the question was passed upon by the Court in *Stevenson v. Ewing*, 3 Pickle, 50, and it is there said: "When a contract is prohibited by statute, it is immaterial to inquire whether the statute was passed for revenue only or for any other object. It is enough that Parliament has prohibited it, and it is therefore void."

By the very terms of the Act of 1891, Chapter 122, Section 3, it is made unlawful for any corpo-

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ration to do, or attempt to do, any business, or to own or acquire any property in the State without having first complied with the provisions of the statute.

Every transaction or contract, express or implied, made by a foreign corporation after the passage of this Act, March 21, 1891, and before its charter was filed and memorandum recorded as the law provides, was illegal, and no rights or remedies can be predicated thereon in favor of the company. With the wisdom and policy of the law this Court has nothing to do. It can only execute it as it is on the statute books, and cannot refuse to enforce it.

A petition to rehear is also presented by the defendants, in which it is insisted that complainants are entitled to no relief, and their bill should be dismissed because they have not proceeded to enforce their rights by attachment or judgment and execution, and the case of *Dollman v. Collins* is cited as controlling.

It is clear that the second section of the Acts of 1889, Chapter 103, giving the right of removal, is a new and additional remedy provided by that Act, to be applied only in cases provided for therein. Clearly, under this section, there is no need of attachment, or of judgment and execution, and neither of these remedies would be proper in such case; but the complainant's remedy is plainly pointed out in the statute, and must be pursued as the Act directs, keeping in view, however, the

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condition that the removal must be made without injury to the property, and with due care for the protection of others who may be interested therein, the general rule being as stated in the case in 6 Pickle, 478, and to be applied by the Court below under the facts of each particular case.

Both petitions to rehear are dismissed.

Albitztigui v. Guadalupe, Etc., Mining Co.

ALBITZTIGUI v. GUADALUPE, ETC., MINING CO.

(Jackson. May 20, 1893.)

1. CORPORATION. *Directors' liability to corporate creditors.*

When the corporate assets paid in and remaining in the treasury subject to debts, though less than the subscribed stock, exceeds all indebtedness of the corporation, the directors cannot be held personally for corporate debts, as having created indebtedness in excess of the capital stock.

2. SAME. *Stockholders' liability to corporate creditors.*

When the corporate assets are abundantly sufficient for payment of debts of the corporation, and have, either by law or by act of the corporation, been set apart and secured primarily for that purpose, stockholders cannot be compelled by creditors to pay up their unpaid stock subscriptions.

Cases cited and approved: Allison *v.* Coal Co., 87 Tenn., 63; Johnson *v.* Churchwell, 1 Head, 146.

3. SAME. *Same.*

Likewise, stockholders' statutory liability for employee's wages cannot be enforced if the corporate assets are unexhausted and sufficient to pay all debts of the corporation.

Code construed: § 1858 (M. & V.).

Case cited and approved: Jackson *v.* Meek, 87 Tenn., 73.

4. SAME. *Same.*

Stockholders' liability upon unpaid subscriptions or for employee's wages cannot be enforced upon the evidence of insolvency afforded by judgment against corporation, and return of *nulla bona* thereon, in a county where it never had any property, it appearing that the complaining creditors had obtained, by act of the company or by legal proceedings, property of the corporation, situated elsewhere, sufficient for payment of their claims, and had not accounted for same.

5. SAME. *Same.*

Doctrine re-affirmed that a *bona fide* purchaser of shares of stock, for value, and without notice that the subscription price is unpaid, cannot be held for the unpaid subscription.

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Cases cited and approved: Planing Mill Co. v. Bank, 86 Tenn., 256; 59 Md., 1.

6. SAME. Payment of subscriptions in land.

Rule stated as to payment of stock subscriptions in land.

Cases cited: Searight v. Payne, 6 Lea, 283; Ins. Co. v. Ins. Co., 11 Hum., 1; 101 U. S., 356; 109 U. S., 527; 90 N. Y., 87.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
PIERSON, Sp. Ch.

J. H. WATKINS and W. M. RANDOLPH & SONS
for Complainants.

JOHN R. FLIPPIN, F. P. POSTON, MYERS & SNEED,
MORGAN & McFARLAND, MALONE & MALONE, H. C.
WARRINGER, LEE THORNTON, T. W. & R. G. BROWN,
and Thos. M. SCRUGGS for Defendants.

WILKES, J. This bill was filed in the Chancery Court at Memphis by creditors of defendant company, its share-holders and directors, seeking:

(1) Decrees against the company for debts claimed to be due to complainants from it, and to wind up the company as insolvent.

(2) To hold the stockholders liable for the company's debts, because the stock held by them has never been paid up.

(3) To hold the directors liable, because they

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have knowingly permitted the company to contract debts in excess of the capital stock paid in.

(4) To hold the stockholders liable for debts due laborers, servants, and clerks.

The individual defendants contest their liability on the following grounds:

(1) They claim that the capital stock has been paid for in two mines situated in the State of Chihuahua, Republic of Mexico, valued at ten millions of dollars.

(2) That the debts of the company have never, at any time, exceeded the stock paid in, and hence the directors are not liable on that account.

(3) That the assets of the corporation have not been exhausted, and, until that is done, the stockholders and directors cannot be held liable.

(4) That complainants have, in their hands and under their control, property of the company in value exceeding the debts owing by the company, for which they have not accounted or offered to account, either before or after suit brought.

Only one of the original incorporators or subscribers is made a party to the suit, all of the other defendants having bought from the original stockholders or their transferees.

Upon the hearing, the Chancellor decreed that the mining company was liable for some amounts, and directed a reference to ascertain and report the amount due each claimant. The bill, as to the stockholders and directors, was dismissed. Complainants appealed, and have assigned errors.

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It appears, from the proof and exhibits in the record, that the unpaid debts of the company are about \$50,000, the exact amounts to be ascertained under the reference ordered.

It appears that Flippin, and other stockholders associated with him, have paid into the company, and for its benefit, about \$165,000 in actual cash, and the company has received, from operating the mines, about \$260,000. It also appears that the company had a certain hacienda property, contiguous to the mines, upon which were situated mills, machinery, implements, tools, etc., of the value of about \$65,000.

A transfer of this property has been made to complainants, in trust for themselves and all other creditors of the company; and while the transfer and assignment was not regularly made by the company itself, still it is recognized and approved by the company.

This property, according to the testimony of the complainants themselves, is in excellent condition.

Independent of this transfer, under the mining laws of Mexico this property is subject to the payment of complainants' debts.

Whether we consider the entire capital stock of ten millions of dollars paid up in the two mines in Chihuahua, as contended by defendants, or whether we consider the \$165,000 actually paid by a part of the stockholders in cash into the company as its only capital, or whether we consider

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the property now in complainants' hands as the actual capital stock paid in, we find that the debts incurred and now outstanding are not in excess of either amount, and hence there is no liability, under the statute, as against the directors, and we need not consider the question whether the debts sued on were or were not incurred with the knowledge and assent of the directors.

Certain debts are claimed to be due to servants, clerks, and operatives of the company, for which it is sought to hold the stockholders liable under the provisions of the statute. M. & V. Code, § 1858.

It appears that the amounts thus claimed are due to three persons—to wit, Thompson, clerk, book-keeper, and manager of the company; Geo. Cann, a blacksmith and machinist, and Gee Lac, a Chinese cook. Each of these parties claims an amount due upon wages or salary, and also for money advanced, either directly to the company or in payment of debts against the company. The exact amount due to each cannot be ascertained until a reference is had, nor can the amounts due as wages be ascertained until that time. It is also claimed, by way of defense, that the claims thus presented are not of that class protected and provided for by the statute. However this may be, the claims do not exceed, in the aggregate, \$7,500.

For reasons already stated, we are of opinion that these parties cannot maintain their suit as against the stockholders. It appears that the hacienda property, with the machinery, mills, etc., al-

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ready mentioned, have been conveyed, and are now in the hands of complainants, to be applied to these debts as well as other debts of the company. This property is independent of the mines, and is estimated to be worth \$65,000. These parties all live, or are engaged, at the mines. Their contracts were made there, and, under the Code of Mining Laws of Mexico, a special preference is provided for them against the property of the company and the output of the mines for the payment, first, of their wages, and, second, for the repayment of the amounts advanced to the company to operate the mines.

For the same reason and upon the same ground, the general creditors must fail in their contention as against the stockholders.

The assets of the corporation are first liable, and the liability of stockholders, either for employes' wages or for unpaid subscriptions, if any, does not arise, and cannot be enforced, until the corporate assets are exhausted. *Allison v. Coal Co.*, 3 Pick., 63; *Jackson v. Meek*, 3 Pick., 73; Morawetz on Corp., Sec. 869 *et seq.*; Thompson on Stockholders, Sec. 334; *Johnson v. Churchwell*, 1 Head, 146.

Only one of the parties to this action has reduced his claim to judgment. Upon this judgment, rendered against the company in Shelby County, an execution has issued, and been returned *nulla bona*. This would, under ordinary circumstances, be *prima facie* evidence of insolvency. It appears, however, that this company has no property in

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Shelby County, and has never had; but its property is situated elsewhere. It also appears that this property has been conveyed to secure the debts of the company, and that complainants, Garcia and others, are in possession of the hacienda property mills, improvements, etc., for the benefit of themselves and all other creditors. In addition to this, it further appears that they have denounced the mines themselves, and taken them into possession under the laws of Mexico, or without warrant of law, and are operating the same.

From the record, it appears that the value of the property thus in the hands of complainants, and for their benefit, exceeds the amount of the debts claimed. How this may be is not yet developed, but the parties complainant have not accounted for any of this property in their possession, nor do they offer to account.

Coming into Court, and asking that equity be done, they must account for the property thus taken into possession, and now held by them, before other relief can be granted them against the stockholders of the company.

All the parties who are sued as stockholders in this cause, except R. F. Looney, hold their stock as transferees and not as original subscribers. They defend, also, upon the ground that they bought their stock in good faith, upon the assurance that it was paid up and non-assessable. The fact that it is paid up and not assessable appears printed upon the face of each stock certificate.

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Under these facts, parties who in good faith hold the stock by transfer, cannot be held liable. *Planning Mill Co. v. Bank*, 2 Pick., 256; Cook on Stockholders, Secs. 50, 257, 423; Taylor on Corporations, Sec. 702; Morawetz on Corporations, Sec. 834; Waterman on Corporations, Vol. 2, Sec. 208; *Brandt v. Ehlen*, 59 Md., 1.

In this view of the case, we do not feel called upon to pass upon the question as to whether the entire capital stock was, in good faith, paid up in the mining property situate in Chihuahua, and whether such transaction would be legal, nor whether the property was estimated at a fictitious valuation.

That the capital stock may be paid in whole or part in property suitable for the purposes of the corporation, provided the same is taken at a cash valuation, is, we think, supported by the statute and the decisions. M. & V. Code, Sec. 1856; *Searight v. Payne*, 6 Lea, 283; Cook on Stockholders, Sec. 13; Waterman on Corporations, Vol. 2, Sec. 188; Morawetz on Corporations, Secs. 425, 426, 825.

And such property may be situate beyond the State. Morawetz on Corp., Sec. 359, 958, 360; *Christian Union v. Yount*, 101 U. S., 356; *Can. So. R. R. Co. v. Gebhard*, 109 U. S., 527; *Ohio Ins. Co. v. Mer. Ins. Co.*, 11 Illum., 1; 90 N. Y., 87.

It is seriously controverted whether the question of *bona fide* payment of the capital stock in land at a cash valuation is properly raised in the pleadings, and whether such question can be raised with-

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out having before the Court all the original incorporators, but one of whom is a party to this action. In the view we have taken of the case, we do not think it necessary to pass upon these contentions.

The decree of the Chancellor is affirmed, with costs, and the cause remanded for further proceedings.

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COLE MANUFACTURING CO. v. FALLS.

(Jackson. May 20, 1893.)

1. MECHANICS' LIEN. *Service of notice of furnisher's lien.*

Furnisher's notice to owner of property of his intention to claim lien for materials furnished to a contractor for use in its improvement is void, if served more than thirty days after the expiration of the furnisher's contract, and before the completion of the building or improvements in which the materials were used.

Acts construed: Acts 1889, Ch. 103.

Cases cited: Reeves v. Henderson, 90 Tenn., 527; Bassett & Clapp v. Bertorelli, *ante*, p. 548.

2. STATUTES. *Repeal by implication.*

A statute amends by substitution and repeals by implication a former law, where the later statute covers the entire subject-matter of the earlier one, and declares that it "shall be amended so as to read as follows," setting out the amendment in full.

Acts construed: Acts 1889, Ch. 103; Acts 1881, Ch. 67 (Code, M. & V., § 2746); Acts 1845-6, Ch. 118 (Code, M. & V., § 2746).

Cases cited and approved: Terrell v. State, 86 Tenn., 523; Poe v. State, 85 Tenn., 495; The Druggist Cases, 85 Tenn., 450.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
W. D. BEARD, Ch.

CASEY YOUNG for Cole Manufacturing Co.

S. J. SHEPHERD for Falls.

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CALDWELL, J. This is a bill to enforce an alleged furnisher's lien, under Chapter 103, Acts of 1889.

The cause is in this Court for the second time, having been here originally on demurrer, impeaching the constitutionality of the Act (90 Tenn., 468), and coming up now on appeal from decree dismissing the bill on the merits.

On final hearing it was shown, under proper pleadings, that defendant, Falls, as owner, contracted with one Rempe, as original contractor, to make certain improvements upon a lot of ground in the city of Memphis; that complainant, under contract with Rempe, furnished certain materials, which he used in making those improvements, and for which he failed to make payment; that complainant thereupon gave Falls notice of its intention to claim a lien upon the property improved, and, within ninety days thereafter, filed this bill to enforce the lien.

The Chancellor was of opinion, and adjudged, that the notice was not given at such time as to fix a lien upon the property; and, for that and other reasons, he dismissed the bill.

Complainant's contract with Rempe expired on the eighteenth of December, 1889, that being the day on which it furnished the last of the materials it was employed to furnish. The notice was given on the twenty-eighth of February, 1890, and the improvements were completed on the twenty-fourth of March, 1890.

Notice, otherwise good, has been held sufficient

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to perfect the furnisher's lien, under the Act of 1889, if given within *thirty days* after the expiration of his contract (*Bassett & Clapp v. Bertorelli, ante*, p. 548), or within *thirty days* after the completion of the improvements (*Green v. Williams, ante*, p. 220); but the case at bar does not come within either of those decisions, because the notice here in question, as already seen, was given *seventy days* after the expiration of complainant's contract, and twenty-four days *before* the completion of the improvements.

Was a notice, given at such a time, efficacious to perfect complainant's inchoate lien? The provision of Section 1, Chapter 103, Acts of 1889, is that a subcontractor, employed by the original contractor to perform labor or furnish materials, shall have a lien, *provided* he give notice of an intention to claim it within thirty days after the building is completed, or his contract shall expire, or he be discharged.

The period in which the notice before us was given is not embraced in that provision. The notice was not given within thirty days after the expiration of complainant's contract, nor within thirty days after the building was completed, nor within thirty days after complainant was discharged; for complainant was not discharged at all, and the notice was given *seventy days* after the expiration of its contract, and twenty-four days *before* the completion of the building.

But it is contended on behalf of complainant

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that prior Acts embrace the period within which the notice in this case was given; and that, when all the Acts are considered together, as it is insisted they should be, it becomes entirely clear that the subcontractor is authorized to give notice at any time between the inception of his contract and the expiration of thirty days after the completion of the building.

The second section of Chapter 118, Acts of 1845-6, gave the subcontractor a lien, on condition that he should give the owner of the property notice of his intention to rely upon it *at the time he began to work or furnish materials.* Code, § 1986. That provision was amended by Section 2, Chapter 67, Acts of 1881, so as to authorize the notice to be given when the subcontractor *began to work or furnish materials, or during the progress of the work, or after its completion,* and before the contractor has been paid. Code (M. & V.), § 2746.

Such was the state of the law on this subject when the Act of 1889 was passed. Hence, if the provision of that Act with respect to notice, is to be taken as but an enlargement of previous legislation, as was that of the Act of 1881, there can be no doubt that the present law (Sec. 1, Ch. 103, Acts 1889), so enlarged, gives all the scope contended for by counsel of complainant, and authorizes the subcontractor to give notice at any time from the commencement of his contract to the end of thirty days after the completion of the building.

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But we do not so understand that provision of the Act of 1889. It was not a mere enlargement of the law previously existing, but an actual *substitute* for it.

The amendment made by the Act of 1881 was by *addition*, but the amendment made by the Act of 1889 was by *substitution*. This is obvious from the language of the respective Acts.

The original provision of the Act of 1845-6, as carried into the Code, is as follows: "Every journeyman, or other person employed by such mechanic, founder, or machinist to work on the building, fixture, machinery, or improvement, or to furnish materials for the same, shall have this lien for his work or materials, if, at the time he begins to work, or furnishes the materials, he notifies the owner of the property, in writing, of his intention to rely upon the lien." Code, § 1986.

The Act of 1881 provides: "That § 1986 of the Code be, and is hereby, amended by *adding* thereto the following, viz: Such person shall also have a lien, if such written notice is served on the owner during the progress of the work, or after its completion, and before the contractor has been paid." Acts 1881, Ch. 67, Sec. 2; Code (M. & V.), § 2746.

The Act of 1889 provides: "That Section 2 of the Act of the Legislature of 1881, Chapter 67, above referred to in this caption, shall be amended *so as to read as follows*, viz.: 'Every journeyman, or other person, employed by such mechanic,

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founder, or machinist to work on the buildings, fixtures, machinery, or improvements, or to furnish material for the same, shall have this lien for his work or material;’ *Provided*, That within thirty days after the building is completed or the contract of such laborer, mechanic, or workman shall expire, or he be discharged, he or they shall notify, in writing, the owner of the property on which the building or improvement is being made, * * * that said lien is claimed.” Acts 1889, Ch. 103, Sec. 1.

That the Legislature intended this last provision to stand in the place of all former legislation on the particular subject then in hand, with the modifications therein made, is unmistakably manifested by the introductory words, declaring that the previously existing law “shall be amended so as to read as follows,” and also by the further fact that the language following that declaration covers the whole subject embraced in the amended law.

It is a clear case of amendment by substitution and repeal by implication. *Terrell v. State*, 86 Tenn., 523; *Poe v. State*, 85 Tenn., 495; *The Druggist Cases, Ib.*, 450.

When this case was here at a former term, it was held that the previous Acts on this subject were “amended and superseded by the first section of the Act of 1889.” 90 Tenn., 471.

It may be suggested that the last provision was obviously intended to better the situation of the

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subcontractor, and that, therefore, greater scope should be now allowed with respect to the time within which he may give notice. The provision was intended to benefit the subcontractor, beyond question; and it so operates. But it does not follow that greater latitude was intended as to the time in which notice might be given. The truth is, that the law in that particular was somewhat narrowed by the Act of 1889; but the subcontractor was, at the same time, given a greater advantage, in that his lien was declared no longer dependent upon the question as to whether or not the owner had paid the contractor in full when the requisite notice should be given. *Reeves v. Henderson*, 90 Tenn., 527; *Bassett & Clapp v. Bertorelli*, ante, p. 548.

Since the notice before us was not given at such time as to perfect complainant's lien, in whatever form it may have been, it is not necessary that its sufficiency or insufficiency as to identification of the property on which the lien was claimed should be decided.

The questions of estoppel and personal liability of Falls for complainant's debt will be disposed of orally.

Affirm, with costs.

McCadden *v.* Lowenstein.

McCADDEN *v.* LOWENSTEIN.

(Jackson. May 10, 1893.)

1. SUPREME COURT PRACTICE. *Upon general exception to evidence.*

This Court will reverse for admission of evidence over the general exception that it is "irrelevant and incompetent," if the evidence was not admissible for any purpose—*e. g.*, if it consisted of *res inter alios acta*.

Cases cited: Garner *v.* State, 5 Lea, 218; Iron Co. *v.* Dobson, 15 Lea, 409.

2. EVIDENCE. *When res inter alios acta.*

In suit by vendee to recover value of goods from his vendor's creditor, who had wrongfully attached them upon a false averment of fraud in the transfer, evidence of what had occurred, after the transfer, in the course of legal proceedings brought by other creditors against the vendor involving the goods, is *res inter alios acta*, and incompetent.

3. CHARGE OF COURT. *Refusal of requests proper, when.*

The trial Court does not err in refusing to give special instructions at the request of a party, unless the request is made, or repeated if previously made, at the close of the general charge.

Cases cited and approved: Railroad *v.* Foster, 88 Tenn., 673; Railroad *v.* Hendricks, 88 Tenn., 718; Roller *v.* Bachman, 5 Lea, 158.

4. ESTOPPEL. *By giving forthcoming bond.*

The owner of goods wrongfully attached for the debt of another, upon a false averment of fraud, who retains possession and gives forthcoming bond for them in the attachment case, to which he is not, and declines to become otherwise a party, is estopped after they have been condemned to sale under the attachment, to maintain independent suit against the plaintiff in the attachment proceedings for the value of the goods thus wrongfully converted.

Case cited and approved: 3 Bush (Ky.), 212.

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5. SAME. *Same.*

But the owner is not estopped in such case to maintain independent suit against the plaintiff in the attachment proceedings for goods other than those attached seized under execution to satisfy balance of judgment in the attachment case.

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. L. B. ESTES, J.

Wm. M. RANDOLPH & Son for Lowenstein.

W. G. WEATHERFORD for McCadden.

McALISTER, J. This is an action of trespass commenced in the Circuit Court of Shelby County by P. McCadden & Co. against B. Lowenstein & Bros., for the alleged wrongful taking and conversion to their own use of a certain stock of merchandise, claimed to be the property of P. McCadden & Co.

The undisputed facts out of which the present controversy has arisen are as follows: In March, 1887, one H. F. Lennox was engaged in the mercantile business at Pendleton, in the State of Arkansas. He had for some time been a customer of P. McCadden & Co. and B. Lowenstein & Bros., of Memphis, and, at the date above mentioned, he

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owed P. McCadden & Co. the sum of \$7,000, and the said B. Lowenstein & Bros. the sum of \$1,400. In addition to this indebtedness, the said Lennox had made other debts, in Memphis and elsewhere, to the amount of several thousand dollars. Lennox, having become embarrassed, and being unable to meet his debts as they matured, sold his entire business and stock of merchandise in store at Pendleton, Ark., to P. McCadden & Co., for the consideration recited in the bill of sale of \$7,290.38.

We understand it to be admitted that, at the date of this transfer, the said Lennox was indebted to P. McCadden & Co. in the sum of \$7,290.38, the consideration expressed in the bill of sale, and it is undisputed that, at this time, the said Lennox was indebted to the firm of B. Lowenstein & Bros. in the sum of \$1,400.

It further appears that after the transfer Lennox returned to Pendleton, opened up a new set of books, and conducted the business in the name of P. McCadden & Co. for about eight days, when he was discharged, and the business was placed in charge of one Watkins, as the agent of P. McCadden & Co. The business was thus conducted for a month or more in the name of P. McCadden & Co., who, from time to time, replenished the stock with goods from their store in Memphis.

On the second of May, 1887, Lowenstein & Bros. sued Lennox in the Circuit Court of Desha County, Arkansas, on a note for \$1,357, and, at

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the same time, sued out an attachment upon the ground that Lennox had sold, conveyed, or otherwise disposed of his property with the fraudulent intent to cheat, hinder, or delay his creditors. This attachment was levied on a sufficient quantity of goods transferred by Lennox to P. McCadden & Co., to satisfy Lowenstein's debt.

P. McCadden & Co. procured a release of the goods by executing a forthcoming bond, under the provisions of § 327, Mansfield's Digest, Statutes of Arkansas, as follows: "The Sheriff may deliver any attached property to the party in whose possession it was found, upon the execution, in the presence of the Sheriff, of a bond to the plaintiff by such person, with one or more sufficient sureties, to the effect that the obligors are bound, in double the value of the property, that the defendant shall perform the judgment of the Court in the action, or that the property or its value shall be forthcoming and subject to the orders of the Court for the satisfaction of such judgment."

P. McCadden & Co. afterwards appeared in the Circuit Court of Desha County and filed a petition to be allowed to interplead, claiming the title to the goods attached. The day following Lowenstein & Bros. filed a motion, in writing, alleging that the forthcoming bond made by P. McCadden & Co. was defective, and the Court ordered that another bond be executed by McCadden & Co., in accordance with the requirements of the statute. McCadden & Co. failed or refused to execute another

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forthcoming bond. On the next day McCadden & Co. filed their petition for leave to withdraw their interplea, filed on the day previous, and to retire from the cause without having their rights adjudicated in said litigation, which motion was granted by the Court, and the interplea withdrawn without prejudice. On the same day Lowenstein & Bros. took judgment against Lennox for the amount of his note, the attachment was sustained, and the goods were ordered to be sold for the satisfaction of said judgment. The Sheriff, in the meantime, had been ordered by the Court to repossess himself of the goods attached, and which had been left in the possession of McCadden & Co. under the security of their forthcoming bond, but the Sheriff was unable to find all of said property.

The Court, in rendering judgment in favor of Lowenstein & Bros. against Lennox, awarded execution, which came into the hands of the Sheriff, who, being unable to find all the goods originally attached, levied the execution on other goods found in the store-house of P. McCadden & Co., at Pendleton, Ark. The property taken under the execution, and that repossessed by the Sheriff under the original attachment, was sold, after advertisement, and the proceeds paid over to Lowenstein & Bros., but the amount realized did not quite satisfy the judgment recovered.

It is claimed on behalf of McCadden & Co., that all the goods taken—those which had been attached and of which the Sheriff repossessed himself, and

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the additional goods levied on under the execution—amounted, according to the invoice cost at the time, to \$2,072.90. McCadden & Co. seek, by the present suit, to recover the value of the property attached, as well as the value of the property seized under the execution, treating the levy of the attachment and the levy of the execution as equally illegal, and, as such, open to question and attack in the present suit. There was a verdict and judgment in the Court below in favor of McCadden & Co. for \$2,666.77. B. Lowenstein & Bros. appealed and have assigned errors.

The first error assigned is that the Court below allowed P. McCadden to testify that "he was at Warner, Lincoln County, Ark., in September following the judgment and proceedings in the suit of B. Lowenstein & Bros. against H. F. Lennox, at Watson, in Desha County, Ark., defending an application made by the creditors of H. F. Lennox for a receiver of the goods and property which Lennox had transferred to P. McCadden & Co., at Pendleton; that the application was before the Circuit Judge in vacation, and Mr. Weatherford was present as the counsel of McCadden & Co., and N. T. White, the attorney of Lowenstein & Bros. in their suit at Watson against H. F. Lennox, which had gone into judgment, was present as one of the counsel of the plaintiff in the application; that the application was argued at some length, and indeed very boldly, remarks having been made and the parties offer-

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ing sympathy for having the entire counsel of Arkansas against P. McCadden & Co., and that particularly was the application argued by Mr. White, he making the closing argument; that no record was kept of what was done, as the case was not pending in Lincoln County, but was heard while Court was in session there, as a matter of convenience; that the Judge made a very lengthy decision in the case, and refused to appoint a receiver. He stated from the bench that on the first application for a receiver made to him in the first of the cases, that he had to decide that it was very fraudulent, but upon hearing the facts, as stated, he found the bill of sale to be good, and so decided; that the decision was made before the goods had been sold by B. Lowenstein & Bros.; that they had been levied on by order of the Court at Watson, and advertised for sale, and B. Lowenstein & Bros. postponed the sale hoping that the receiver would be appointed, and made the sale after the application."

The exception to this evidence saved by counsel for plaintiff in error was, viz.: "To each of the said questions and answers, respectively, the defendants at the time objected, because the same were irrelevant and incompetent." It is insisted that this exception is too general to challenge the attention of the lower Court to the real objection to the testimony, and that, under the rulings of this Court, such general exception cannot be relied on for a review of the objectionable evidence.

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As a rule, a general exception is inefficacious to put the Court in error. Upon principle, it is the duty of a party objecting to evidence to communicate at the time to the Court and the opposite party the grounds of his objection, for the obvious reason that they should have an opportunity of acting advisedly, and not be entrapped into error. *Garner v. State*, 5 Lea, 218.

It is plainly the duty of counsel to take the judgment of the Court on the specific ground then made, so that this Court can review it. The contrary practice gives the party an opportunity to state one ground in the Court below, which may be properly overruled, and to rely upon entirely different ground here. *Knoxville Iron Co. v. Dobson*, 15 Lea, 409. But when evidence is not competent for any purpose, or is wholly irrelevant, a general objection would be sufficient. The evidence excepted to in this case was not competent for any purpose, and introduced collateral matters which were *res inter alios acta*, and highly prejudicial to plaintiff in error. The Court allowed McCadden to testify to what occurred at a trial at Warner, Lincoln County, Ark., on an application for the appointment of a receiver in a suit between Lennox and other creditors. McCadden was allowed to testify to the statements of the Judge at Warner that, on a former application, he had decided that the bill of sale from Lennox to McCadden was very fraudulent, but, upon hearing the facts, he found the bill of sale good. The Court also

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allowed McCadden to testify that the Circuit Judge at Warner refused the application for a receiver.

B. Lowenstein & Bros. were not bound by anything said or done on the application. 1 Wharton on Evidence, Secs. 760, 764, 820, 823. The exceptions should have been sustained and the evidence excluded. The second assignment of error is that the Circuit Judge refused certain instructions, numbered one to seven, inclusive, and set out at pages 124 to 134 of the record.

It appears from the record that these requests were submitted to the Court immediately after the close of the evidence, and before the general charge was delivered. The record recites that the Court overruled, and refused to give the said instructions, except as they are embodied in its general charge. It then gave the jury the following instructions—and here follows the general charge of the Court. The specific instructions asked were not renewed after the delivery of the general charge, and, under well-established rules of practice, and repeated decisions of this Court, error cannot be predicated upon such refusal to charge. *Railroad v. Foster*, 4 Pickle, 673; *Railroad v. Hendricks*, 4 Pickle, 718; *Roller v. Bachman*, 5 Lea, 158.

The next assignment of error is that the Court erred in the following charge to the jury, to wit: "The Court charges you that McCadden & Co. had the right to give a bond to retain the goods levied on in the case of *B. Lowenstein & Bros. v. Lennox*; that they had the right to come in and

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make themselves parties by interplea, which they did; that the Judge adjudged the bond given by them insufficient, and ordered the officer to retake the goods; that they asked leave of Court, and were allowed to retire from the suit without prejudice. The effect of this was to put them in the same position as if they had never been in the suit, and in no way affects their rights in this suit." As opposed to the view of the law embodied in the charge of the Court, counsel for B. Lowenstein & Bros. insist that the record of the suit in the Desha County Circuit Court, wherein B. Lowenstein & Bros. were plaintiffs, and H. F. Lennox defendant, and exhibited in evidence, is conclusive that the property attached in that suit was subject to the attachment and to the payment of the judgment B. Lowenstein & Bros. recovered against H. F. Lennox, and that P. McCadden & Co. are estopped by the forthcoming bond they executed for the property attached, and by the judgment in that suit condemning the property to be sold, from setting up title to that property, or claiming that it was not subject to the attachment or the judgment.

It is insisted on behalf of defendant in error that McCadden & Co. never entered into any bond which could have the effect of making them parties to the case of *Lowenstein v. Lennox*. It is true, the Supreme Court of Arkansas decided in that case that such bond was not a valid statutory bond, because not conditioned that the defendant

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in the attachment suit shall perform the judgment of the Court, and for that reason refused a summary judgment on the bond. The decision went no further, and did not intimate that the bond was not a valid obligation, and could not be enforced as a common law bond. At all events, it appears from the record that P. McCadden & Co. procured the release and obtained the possession of the attached property by executing the bond in question, and thereby said firm became parties to the proceedings in that suit, regardless of the fact that the condition of the bond was not in precise conformity to the requirements of the statute. It is true that McCadden & Co. are not estopped by reason of afterwards filing an interplea in that case, since they were afterwards permitted by the Court to withdraw their interplea.

In 2 Black on Judgments, Sec. 576, it is said that where a third person intervenes in a pending action for the purpose of claiming the fund or the chattel in controversy, as his own, he is concluded by the judgment in that action, and cannot afterwards sue on the same claim, at least in respect to any title acquired prior to the intervention. But he must actively and substantially make himself a party in order to be bound. Thus, where one claiming personal property attached in an action against another appeared in such action and took time to file a petition of intervention, but withdrew without filing such petition, it was held

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that he was not bound by any subsequent proceedings in the action.

All this is conceded by counsel for plaintiff in error, but it is insisted that the interplea was no part of the forthcoming bond McCadden & Co. gave the Sheriff to secure the release of the property attached; that the bond and interplea were distinct steps taken in the attachment proceedings, and had no relation to each other. The bond was executed by McCadden & Co. in May, at the time the goods were attached, and the interplea was not filed until August, when the Court convened. It is insisted that when the Court permitted McCadden & Co. to withdraw the interplea without prejudice, it did not affect the legal status of McCadden & Co., as fixed in that lawsuit by the execution of the forthcoming bond.

The insistence of counsel is that by executing the forthcoming bond under Section 327 of Mansfield's Digest, Arkansas Statutes, and recovering the property attached by the Sheriff, McCadden & Co. bound themselves, in the manner shown by the bond, for the performance of the judgment of the Court in that case. They thereby made themselves parties to the suit, independent of any interplea they might file, or any claim they might interpose to the property attached. What, then, was the effect of the execution of the replevy or forthcoming bond by McCadden in the case of *Lowenstein Bros. v. Lennox*, and did they thereby become parties to that case in such a sense that they are

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bound by the judgment in that case? In the case of *Miller v. Desha*, 3 Bush (Ky.), 212, the property attached was claimed by a third person, found in possession of it, and such third person gave a bond for its forthcoming, in substance the same as the bond required by Section 327 Mansfield's Digest, Arkansas Statutes. After giving the bond, the claimant of the property failed to interplead or make any other defense on the attachment suit, and a judgment was rendered in favor of the plaintiff in the suit and against the defendant, and an order was made for the sale of the property attached for the satisfaction of the judgment rendered. The question was as to the effect of the judgment as between the claimants of the property attached and the plaintiff in the attachment suit. The Court decided that the claimant was estopped from setting up any further claim to the property, and that it was subject to the payment of the judgment. The syllabus of the case is as follows: "The claimant of attached property, who executes a bond and retains possession of the property, has legal notice that the suit is pending to subject the property, and if he remains quiescent as to his claim until, by judgment, the property is subjected to the attachment, he shall not be heard in any defense to the bond, nor to a suit for the recovery of the property, or money for which it was sold."

We think these principles apply to this case. The record in this case shows that P. McCadden & Co. had notice of the attachment proceedings

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in Arkansas, and by the execution of a forthcoming bond they remained in possession of the property attached. Subsequently, they presented their petition, and were allowed to file an interplea setting up their claim of title to the property attached. The next day they elected, voluntarily, to withdraw such interplea, and retire from the case. But this retirement did not, and could not, prejudice the rights of B. Lowenstein & Bros. Although McCadden & Co. withdrew their interplea without prejudice, they still remained in possession of the goods attached, and in this way continued to be parties to the proceedings. In the opinion of the Court, it was the duty of McCadden & Co. to assert their title to the goods in that proceeding, and, having failed to do so, they, in effect, agreed that the Court should proceed to render the proper judgment in the case of *Lowenstein v. Lennox*, and that the property attached was subject to condemnation for the satisfaction of that judgment. In the opinion of the Court, P. McCadden & Co. are now estopped to maintain an action in Tennessee to recover the value of the property attached, upon two grounds, to wit: first, they should have asserted their title in the attachment proceedings in Arkansas; and, second, for the reason that they failed to deliver up all of the property replevied for the satisfaction of the judgment recovered by Lowenstein against Lennox.

There is another branch of the case that remains to be considered. It appears from the record that

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when the Circuit Court of Desha County pronounced judgment in favor of B. Lowenstein & Bros. against Lennox, it awarded execution, and the Sheriff was also ordered to retake and repossess himself of all the property originally attached. The Sheriff, having failed to recover a large amount of the property replevied by McCadden & Co., proceeded to levy his execution upon other goods in their store-house, but which goods were not embraced in the original attachment. Lowenstein & Bros. indemnified the Sheriff, who, after advertisement, sold the goods and paid over the proceeds to that firm. The judgment and execution under which the Sheriff made his levy were against Lennox, and not against McCadden & Co. B. Lowenstein & Bros. would, therefore, be liable for the value of any goods seized and sold under this execution which were not embraced in the original attachment; and to recover the value of those goods McCadden & Co. will be entitled to maintain their action.

The judgment of the Court below is reversed, and the cause remanded for a new trial.

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(Jackson. May 25, 1893.)

INJUNCTION. *Of decree for alimony.*

The wife obtained decree for divorce *a mensa et thoro* and alimony. Subsequently the husband obtained, in a new suit, an absolute divorce, upon the ground that the wife had another living husband at the time of her marriage. The Chancellor refused, however, to enjoin the wife's decree for alimony entered in first case.

Held: This was error. The decree for alimony should be perpetually enjoined.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
W. D. BEARD, Ch.

J. E. BIGELOW and B. F. BOOTH for Complainant.

MORGAN & McFARLAND and A. H. DOUGLASS for Defendants.

WILKES, J. On the twelfth of August, 1881, Virginia Scurlock filed a bill for divorce from Robert Scurlock, the complainant in the present suit, in the Circuit Court of Shelby County, and,

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on the hearing on the twenty-third of September, 1882, a decree was entered, granting her a divorce *a mensa et thoro*, and also granting her alimony pending the separation, and a reference was ordered to report what would be a proper allowance for such alimony.

Subsequently, the Clerk reported that five dollars per month would be a proper and fair allowance, and this was by the Court confirmed. The cause was retained in Court, and other proceedings were had from time to time, until the fourth of June, 1888, when the Clerk again reported that the alimony at that time in arrears amounted to \$265, and for this sum judgment was rendered. Upon this judgment various payments were made, amounting, in the aggregate, to \$170.

On the fifth of January, 1888, Virginia filed a supplemental bill or petition in the cause, asking for an absolute divorce, and for a permanent allowance for alimony, and on this supplemental proceeding decree was rendered January 8, 1890, granting her an absolute divorce, and giving her judgment for \$1,050 alimony, which amount was intended to include the amount then due on the original decrees, and an additional amount to cover attorneys' fees, etc.

Robert Scurlock thereupon filed in said Court a petition for writs of error *coram nobis* to set aside the decree and proceedings under the supplemental bill, upon the ground that he had no notice of the same; and on the hearing the Court granted

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him the relief asked, and vacated the judgment for absolute divorce, and for the \$1,050.

On May 3, 1890, Virginia filed a second supplemental bill, asking again for absolute divorce, upon the ground that Robert had continued to stay away from her, and there was no probability of any restoration of the marital relation.

The Circuit Court refused her the relief asked, upon the ground that the continued absence of the husband was caused by the decree of separation, and not by his own volition. Whereupon, Virginia appealed to this Court, and at the April term, 1891, this Court affirmed the decree of the Court below, and did not remand the cause for any further proceeding.

In June, 1891, Virginia, by her attorney, again appeared in the Court below and renewed the reference as to the amount then due her under the original proceeding, and the Clerk made report, and upon it a decree was rendered December 8, 1891, for \$367.48, arrears of alimony at that date.

It is to enjoin this judgment and have it vacated that the present bill is filed, and it also prays for absolute divorce upon the part of Robert, upon the ground that Virginia never was his wife, but was the wife of another man at the time she entered into the marital relation with him; and upon the hearing, the Chancellor granted to Robert a decree for absolute divorce upon the ground alleged and proven, but declined to enjoin the col-

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lection of the judgment for \$367.48, which had previously been rendered by the Circuit Court of Shelby County in favor of Virginia.

No appeal was prayed by Virginia from the decree against her, granting the absolute divorce upon the ground stated, that she never was the wife of Robert, but Robert appealed from that part of the decree refusing to enjoin the Circuit Court judgment, and assigns the refusal as error.

Inasmuch as it clearly appears from the proof, and is conceded by the failure to appeal from the decree of the Court below granting the divorce, that Virginia never was the wife of Robert, but, at the time of her alleged marriage to him, she was the wife of another man, it would now be clearly inequitable and unjust to allow her to enforce this judgment for alimony. Having never sustained the legal relation of wife, she could not be entitled to any alimony based upon and growing out of that relation; and, under the facts as found in the present proceedings, she would not be entitled to any relief as against the present complainant, Robert.

It would be clearly against equity and good conscience to allow this judgment now to be enforced, and the jurisdiction of the Chancery Court and of this Court to enjoin its collection is well sustained by the authorities. 2 Pomeroy's Equity Jurisprudence, Sec. 1360; Gibson's Suits in Equity, Sec. 796; 1 Story's Equity Jurisprudence, Sec. 887.

The decree of the Chancellor refusing relief as

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against this judgment in the Circuit Court of Shelby County for \$367.48, of date December 8, 1891, is reversed; and said judgment is perpetually enjoined, as well as all other proceedings in said original cause of *Virginia Scurlock v. Robert Scurlock*.

The costs of this cause will be paid by Robert Scurlock, including the costs of this Court and of the Court below.

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* RALPH DAVIS v. STATE.

(Jackson. May 24, 1893.)

1. ATTORNEY AT LAW. *Proceedings to disbar. Maintainable, when.*

An attorney may be disbarred for misappropriation of his client's funds before the client has obtained judgment against him for the amount misappropriated. (*Post, pp. 638-641.*)

Code construed: §§ 4360, 4363, 4745, 4746, 4747 (M. & V.); §§ 3616, 3619, 3970, 3971, 3972 (T. & S.).

Cases cited and approved: Brooks v. Fleming, 6 Bax., 337; Smith v. State, 1 Yer., 228.

2. SAME. *Same.*

And an attorney may be disbarred for misappropriating his client's funds before any conviction upon a criminal charge for such misappropriation. (*Post, pp. 641-645.*)

Cases cited approved: Fields v. State, M. & Y., 168; Smith v. State, 1 Yer., 228; 17 Otto, 273.

3. SAME. *Not entitled to jury trial.*

And in proceedings to disbar an attorney for misappropriation of his client's funds, he is not entitled to a trial of the issues by a jury. (*Post, pp. 641-645.*)

4. SAME. *How disbarment proceedings are tried in this Court.*

Upon an appeal from a judgment disbarring an attorney, this Court tries the case *de novo*, giving no weight to the trial Judge's findings of facts. (*Post, p. 646.*)

5. SAME. *Sufficiency of the evidence.*

This Court finds that the evidence, set out in the opinion, sustains the charge that defendant misappropriated his client's funds. (*Post, p. 646 et seq.*)

6. EVIDENCE. *Of payment.*

Plaintiff proved payment without receipt. Defendant denied payment. Plaintiff's witness proved payment and the giving of a receipt. The

* Mr. Davis has recently been restored to practice upon his application to the Circuit Court at Memphis.—REPORTER.

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defendant moved to compel production of receipt, and excepted to parol evidence of the payment. The Court overruled the motion and exception.

Held: This was not error. (*Post, pp. 644-646.*)

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

HOLMES CUMMINS, ESTES & FENTRESS, and MALONE & MALONE for Davis.

L. LEHMAN, TURLEY & WRIGHT, and J. M. GREER for State.

McALISTER, J. This is a proceeding in the name of the State, on the relation of Nathan Simon, commenced in the Circuit Court of Shelby County against Davis, for the purpose of having him disbarred as a practicing attorney in the Courts of the State of Tennessee. The specific grounds upon which disbarment is moved are thus set forth in the petition, viz.: That in the year 18— one Lachman was indicted in the Criminal Court of Shelby County for the crime of arson, and Nathan Simon became a surety on his bail-bond in the penalty of five thousand dollars. The said Lachman was found guilty of said charge, and the jury fixed his punishment at eight years

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in the State prison. Pending a motion for a new trial, Lachman forfeited his bond and became a fugitive from justice. Such proceedings were had that judgment final was rendered against the said N. Simon and his co-surety on the bail-bond in the sum of five thousand dollars. Petitioner, desiring to be relieved of said judgment, retained the said Ralph Davis as his counsel for that purpose. Petitioner employed Davis on the fourteenth of December, 1891, and paid him on that day, at his request, a retainer fee of two hundred and fifty dollars. At a later date petitioner paid Davis an additional fee of two hundred dollars, making, in the aggregate, the sum of four hundred and fifty dollars paid him in fees on account of his employment.

The petition further recites that Davis, shortly after his professional employment as aforesaid, informed the said Simon that he had succeeded in getting the Criminal Court to agree that said judgment might be settled for the sum of twenty-two hundred and fifty dollars, and, believing this statement to be true, and confiding in the integrity of said Davis, that Simon from time to time paid over to Davis the sum of twenty-two hundred and fifty dollars. Petitioner further states that, after he had delivered the said sum of twenty-two hundred and fifty dollars to the said Davis, for the purposes and on the representations as aforesaid, Davis assured petitioner that this money had been applied to the payment and satisfaction of said

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judgment, and that the same had thereby been canceled and fully discharged. Petitioner charges that said judgment has not been paid or satisfied, and that said sum of twenty-two hundred and fifty dollars has not been applied thereto, but that of this sum only one thousand dollars has been so applied, and the balance of twelve hundred and fifty (\$1,250) dollars has been misappropriated by said Davis. Petitioner further avers that the fact of this misappropriation of petitioner's money was recently published in the newspapers of Memphis, which fact so infuriated Davis that he openly and publicly declared his intention to have execution issued against your petitioner on said judgment for the sum of four thousand dollars; that on the thirtieth of January, 1893, which was the next succeeding business and judicial day after said threat was made, a special order was entered in said Criminal Court of Shelby County for the issuance of an execution for the enforcement and collection of the balance of said judgment, which order the petitioner charges was caused or procured to be made by said Davis, and thus in violation of his employment and professional obligations as an attorney.

In accordance with the prayer of the petition, the defendant, Davis, was cited to appear before the Circuit Court of Shelby County on the eleventh of February, 1893, and show cause why he should not be stricken from the rolls and not be permitted to practice his profession in any Court of rec-

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ord in this State. The defendant appeared, and moved to quash the petition, citation, etc., on the ground that the matters therein stated are not sufficient in law to warrant his disbarment, and because the petition and motion to disbar were premature, and because the plaintiff had no right to maintain the cause or have the relief prayed. On motion of counsel for petitioner, the proceeding was amended so as to stand in the name of the State of Tennessee, on the relation of Nathan Simon, against Davis; and thereupon the Court overruled the defendant's motion to quash the proceedings. It was then agreed between the counsel for both parties that defendant's answer need not be in writing, and the same was stated to be not guilty. The Court, after hearing the evidence and argument of counsel, adjudged that the allegations of the petition had been established by the proof; whereupon it was further ordered, adjudged, and decreed by the Court, that the defendant be stricken from the rolls as a practicing attorney of this Court and of the Courts of the State of Tennessee, and that he be deprived of his license and deprived of the right to practice his profession in any Court of record in this State. The defendant has appealed, and we are very earnestly pressed to reverse this judgment, on account of various errors that are assigned, and for the reason that the weight of the evidence does not support the finding of the Circuit Judge.

The first assignment of error is that the Circuit

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Judge disregarded, in his findings, the statute relative to motions against attorneys for failing to account for money received in their professional capacity. The statute referred to is § 4360, Code (M. & V.), as follows: "Judgment may in like manner be had in favor of the party aggrieved against any attorney in this State, upon five days' notice, for any money collected or received by him in that capacity, and not paid over on demand by the person entitled, his agent or attorney." Section 4363 further provides, viz.: "Upon the return by the proper officer of an execution issued on the judgment recovered under this article, with the indorsement thereon that the money cannot be made, or not sufficient property of the defendant to be found to make the same, it is the duty of the Court to strike such delinquent from the roll of attorneys, who shall thenceforward be disqualified to practice in the Courts of this State until the debt is paid." The insistence of defendant's counsel is that the above sections of the Code prescribe the practice and set forth the law governing motions against attorneys, and that no motion to strike from the rolls or disbar an attorney can be entertained unless a judgment against him for the money has first been obtained, execution issued thereon and returned *nulla bona*. The argument is that it is nowhere shown or alleged that any notice had been given to Davis to account for the alleged shortage, nor had any judgment been recovered against him for failure to pay over. Hence, it is

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claimed that the action of the Circuit Judge was premature, unauthorized, and illegal, and that it was error in the Court to refuse to quash the petition, citation, and motion.

It has been decided by this Court that this statute, giving a summary remedy by motion against attorneys for money collected in a professional capacity and misappropriated, is a substitute for the more tedious remedy by action of assumpsit, or debt, at common law. *Jones v. Miller*, 1 Swan, 151. The primary purpose of the statute is to afford an expeditious remedy to the aggrieved client for the misappropriation or non-payment of his money, and the suspension or disbarment of the attorney only follows his failure to pay the judgment against him. But we do not understand this statute to restrict or affect in any way the inherent jurisdiction of all Courts to deal with its officers in a summary way for malpractice or misconduct in their official character. Weeks on Attorneys, 140; *Brooks v. Fleming*, 6 Bax., 337; *Smith v. State*, 1 Yer., 228. This power of disbarment is not exercised by the Courts for the purpose of enforcing remedies between the parties, but to protect the Court and the public against the official ministration of an attorney guilty of unworthy practices in his profession. If a statute were necessary to enable the Courts to exercise this jurisdiction, it is supplied by § 4745 of the Code (M. & V.), viz.: "The several Courts of this State may strike from their rolls any person not

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authorized to practice in such Courts, and also any practicing attorney or counsel, upon evidence satisfactory to the Court that he has been guilty of such misdemeanor, or acts of immorality or impropriety, as are inconsistent with the character or incompatible with the faithful discharge of the duties of his profession."

Section 4746 provides: "If charges are preferred against an attorney or counsel to any Court, they shall be reduced to writing, and a copy furnished the party accused, who may appear and show cause against the charges."

Section 4747 further provides, viz.: "The person stricken from the rolls under either of the foregoing sections, or for other good cause, shall not be permitted to practice the profession in any Court of record in this State." We do not agree with counsel for defendant, that the Court below had no jurisdiction of this complaint for the reason there had been no judgment for the money execution thereon, and return of *nulla bona*. We think there was ample jurisdiction, both statutory and common law.

The next error assigned is that the trial was by the Court, and not by a jury. It is insisted that where the facts are disputed and the evidence is conflicting, the only proper method of trial is by jury. It may be remarked, in the first place, that there was no demand by Davis in the Court below for a trial by jury. Ordinarily, this failure to demand a jury would, as a matter of law and

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fact, be construed as a willingness on the part of the defendant to submit the matters in controversy to the judgment of the Court, without the intervention of a jury. But it is insisted this charge is criminal in its nature, and that the Court should not have assumed to strike the defendant from the rolls as an attorney until a jury of his peers had passed upon the facts. In other words, the contention is, the charge being of a criminal nature, and the facts disputed, the Circuit Court was without jurisdiction until there had been a conviction of the defendant by a jury in a criminal prosecution. We are of opinion that the great weight of authority is opposed to this contention, and that a proceeding for disbarment is tried summarily by the Court without a jury, and that a previous conviction of the criminal offense involved is not necessary.

In the case of *Fields v. State*, Martin & Yerger, 168, it appeared that Fields, a Constable, had been convicted in the lower Court of a charge of extortion, and, pending his appeal, he was summarily suspended or removed from office by the County Court. It was held that a previous conviction was not necessary to enable the Court to suspend from office; that the constitutional privilege of trial by jury for crime does not apply to prevent Courts from punishing its officers for contempt, and to regulate them or remove them in particular cases; that removal from office for an indictable offense is no bar to an indictment; that it

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is in its nature civil, and collateral to any criminal prosecution by indictment.

In the case of *Smith v. The State*, 1 Yer., 228, which was a proceeding to disbar an attorney, this Court, through Justice Catron, said, viz.: "The principle is almost universal in all governments that the power which confers an office has also the right to remove the officer for good cause. In all those cases the tribunal removing is of necessity the judge of the law and fact, to ascertain which every species of evidence can be heard, legal in its character, according to common law rules and consistent with our Constitution and laws." In this case there was no previous conviction of the offense involved; nothing but an indictment against the attorney, found in another State, and yet this Court held that the Court below might lawfully proceed with the case.

Says Mr. Justice Bradley in *Ex parte Wall*, 17 Otto, 273, viz.: "It is laid down in all the books in which the subject is treated, that a Court has power to exercise a summary jurisdiction over its attorneys, and to punish them by fine and imprisonment for contempts, and, in gross cases of misconduct, to strike their names from the roll. It is held in this case that the proceeding to strike an attorney from the roll is one within the proper jurisdiction of the Court of which he is an attorney, and does not violate the constitutional provision which requires an indictment and trial by jury in criminal cases; that it is not a criminal

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proceeding, and not intended for punishment, but to protect the Court from the official ministrations of persons unfit to practice as attorneys therein; that such a proceeding is not an invasion of the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law, but that the proceeding itself, when instituted in proper cases, is due process of law." Justice Bradley, in this case, draws a distinction between acts charged to have been committed by the attorney in his professional character and acts not committed in such official capacity, and holds that, in respect to these latter acts, the Courts will not strike his name from the roll until he has been regularly indicted and convicted, but that even this last exception to the rule is not an inflexible one. It follows that, under the authorities cited, which we think state the true rule on this subject, this assignment of error must be overruled.

The next assignment is that the Circuit Judge erred in not allowing the motion of defendant to compel Harry Simon to produce the receipts for twenty-two hundred and fifty dollars alleged to have been paid Davis.

In explanation of this assignment of error, it is necessary to state that the relator, Nathan Simon, testified on the trial that he made certain payments in cash and by notes to Davis, amounting to twenty-two hundred and fifty dollars, and that he took no receipts from Davis. Harry Simon, brother of relator, was introduced as a witness, and testified

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that he was present at the meeting on the thirtieth of March, 1892, and that Davis wrote, signed, and delivered to Nathan Simon a receipt for twenty-two hundred and fifty dollars, covering the payment of fifteen hundred dollars on the seventeenth of December, 1891, and the two notes for two hundred and fifty dollars each and two hundred and fifty dollars in cash delivered to Davis on the thirtieth of March, 1892. It is contended by counsel for defendant that the receipts themselves were the best evidence, and, on failure to produce them or account for their absence, it was error to allow oral proof of payment of such moneys to defendant covered by such receipts. Davis himself testified that he made no such payments, and, hence, he could not have executed such a receipt as that described by Harry Simon. The theory of the State was that no receipt was in fact executed, and that Harry Simon was in error in so stating. The state of the case, then, was simply this, that a witness introduced by a party to the suit states a fact differently from the statement of the party himself. Is the party bound by the statement of his witness, or may he show a different state of facts by other witnesses? While a party cannot ordinarily discredit his own witness, his right to prove facts by other witnesses inconsistent with those stated by his witness is unquestioned. Wharton on Evidence, Vol. 2, Sec. 549.

The discrepancy in the statements of these two witnesses simply went to their credibility, and was

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a proper matter for consideration in determining the weight of their testimony. It was clearly no ground for the exclusion of all oral proofs of payment of this money, that one of the witnesses had testified that a receipt was given, and the receipt itself was not produced, or its absence explained. The witness may have been mistaken, and the question of fact was for the determination of the Court on all the evidence submitted.

The remaining question to be considered is, whether the finding of the Circuit Judge is supported by the evidence. It will be remarked that this case is not within the rule of practice established by this Court, which requires the affirmance of a judgment pronounced by a Circuit Judge without the intervention of a jury, when, upon an examination of the record, any material evidence is found to support it. This is a summary proceeding, bearing an analogy to an action for the removal of a Sheriff, or other public officer, and is to be tried by this Court like a case in equity *de novo*, requiring a preponderance of the evidence on all disputed questions of fact which are material to support the judgment.

Nathan Simon, the petitioner in the case, was introduced as a witness on the trial, and testified that he had employed Davis as his attorney in the matter of the forfeited bail-bond, for the purpose of procuring a reduction of that judgment; that Davis shortly afterwards informed him that he had succeeded in getting the Criminal Court to

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reduce that judgment of five thousand dollars down to twenty-two hundred and fifty dollars, and that it could be settled by the payment of that amount. Simon testified that at a later date Davis told him he must at once pay fifteen hundred dollars on the judgment; that, thereupon, he borrowed fifteen hundred dollars from the Manhattan Savings Bank, upon the pledge of a certificate of building and loan association stock, and that he immediately turned over the money to Davis, who promised to pay it into the Criminal Court on that judgment. Simon admits that he took no receipt from Davis for the money, but states that he asked Davis if it was necessary to make a receipt for this, to which Davis replied: "No; I am going to call on you for seven hundred and fifty dollars later on."

Simon further testified that this money was paid over to Davis on the seventeenth of December, 1891, the same day it was borrowed from the Manhattan Bank, and that he gave Davis the money between 2 and 3 o'clock in the afternoon, according to the best of his recollection.

The witness further states that three days afterwards Davis told him he had paid the money into the Criminal Court. Simon further testified that on the thirtieth of March, 1892, Davis told him he wanted seven hundred and fifty dollars more for the settlement of the judgment, and on that day he paid him two hundred and fifty dollars in money and delivered to him two notes for two hundred and fifty dollars each, which were indorsed by his brother,

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Harry Simon. Simon produced in evidence a check dated March 30, 1892, payable to himself, for two hundred and fifty dollars, stating that he drew the money on his way to Davis' office, and paid it to Davis, as already stated. Simon states, further, that on the same day—to wit: the thirtieth of March, 1892—on the demand of Davis, he executed another note for two hundred dollars, in payment of balance of Davis' fee, having already paid him, on the fourteenth of December, 1891, the sum of two hundred and fifty dollars. The two notes for two hundred and fifty dollars each, and the third note for two hundred dollars, were all dated March 30, 1892, payable "to the order of myself (N. Simon)," indorsed by Harry Simon, and, viz., "For collection, Ralph Davis." Simon testifies that these notes were all paid by him (not until he had allowed two of them, however, to go to protest), and that Davis got, in fees and money to be applied on the judgment, the sum of twenty-seven hundred dollars, and that, of this amount, only one thousand dollars had been applied to the payment of the judgment. Simon further states that, as the result of having charged Davis with a misappropriation of this money, he has been arrested, and is now being prosecuted on a charge of criminal libel, and that an execution had issued against him for the balance of the Criminal Court judgment, to wit: the sum of four thousand dollars; and that his store was in the hands of the Sheriff at the time he testified.

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Defendant Davis testified in his own behalf. He admitted his professional employment by Simon to secure a reduction of the judgment on the forfeited bail-bond, and the payment to him by Simon of a retainer fee of two hundred and fifty dollars. Davis states that he obtained a reduction of the Criminal Court judgment to twenty-five hundred dollars, but admits that no petition was filed by him in the case, and no entry of the action of the Court in granting the reduction was made upon the minutes. Davis testifies that he reported this reduction of twenty-five hundred dollars to Simon, and advised him to settle on that basis; that Simon told him he did not have the money; that he had been trying to make arrangements to borrow some money from a building and loan association on some stock. Defendant testified that he told Simon the matter would have to be fixed up on the following day at twelve o'clock, and that on the next day Simon came to his office without the money, and suggested to Davis the advisability of his making a loan to him, Simon. Davis states he then said to Simon he thought the judgment could be temporarily suspended for one thousand dollars, and that Simon then asked him for a loan of one thousand dollars. Davis states he then asked Simon what interest he could pay, and Simon replied he would give him fifty dollars for sixty days. Defendant testifies he then sent for his brother, David Davis, who was credit man at B. Lowenstein & Bros., and, upon inquiry

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in respect to Simon's financial standing, his brother told him Simon was indebted to a number of persons and to B. Lowenstein & Bros. for \$2,280, but that he considered him good, as he had an interest in the Simon estate, and his brother, he says, advised him to make the loan. Davis states he then drew up a note for \$1,050, payable sixty days after date, and Simon signed it; that witness and his brother then went to the wholesale department of B. Lowenstein & Bros. and procured a package of one thousand dollars belonging to defendant, from a safe where it had been previously deposited.

Defendant further states that, after getting his dinner, he went immediately to the Criminal Court, and paid over this one thousand dollars, which had come out of the box, to Hunter, Deputy Clerk of the Criminal Court, and that Hunter gave him a receipt, which he turned over to Simon. This money, the witness states, was paid to Hunter on December 17, 1891, and not later than half-past one o'clock of that day. Defendant states that the note for one thousand and fifty dollars, which Simon had given him, he deposited with his brother, David Davis; that this note was not paid at maturity, but that, in the latter part of February, Simon paid him three hundred dollars in cash, which was credited on the note, and that, on March 30, 1892, Simon executed three notes for the balance—that is to say, two notes for two hundred and fifty dollars each,

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and one note for two hundred dollars. Davis further testifies that, on the same day, to wit, March 30, 1892, Simon paid him the sum of two hundred dollars, balance due on his fee, which was originally fixed at five hundred dollars, but which he had agreed to reduce to four hundred and fifty dollars. Davis denies that Simon paid him fifteen hundred dollars, or any other amount, on December 17, 1891, but, on the contrary, he states Simon borrowed one thousand dollars from him on that day, and gave him his note for one thousand and fifty dollars—covering principal and agreed interest. According to the testimony of Davis, the state of the account between him and Simon was as follows: December 14, 1891, retainer fee paid Davis, \$250. December 17, 1891, loan of \$1,000 by Davis to Simon. Latter part of February, 1891, cash on loan paid by Simon to Davis, \$300. Three notes, dated March 30, 1891, executed by Simon to Davis, two for \$250 each and one for \$200, amounting in all to \$700, for balance on original loan note. Cash paid Davis, for balance of fee, March 30, 1892, \$200. Interest on loan, \$50. Total, \$1,500.

As opposed to the statement of Davis, Simon claims the matter stands thus, viz.: December 14, 1891, fee paid Davis, \$250; December 17, 1891, cash paid Davis, \$1,500; March 30, 1892, cash paid Davis, \$250; March 30, 1892, two notes of \$250, each, \$500; March 30, 1892, note, balance of fee, \$200. Total, \$2,700.

An analysis of the respective statements of these

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witnesses will show they are in entire accord on only one proposition, to wit: The payment of a retainer fee of two hundred and fifty dollars paid Davis on December 14, 1891.

They agree that an additional fee of two hundred dollars was paid Davis, but disagree in respect to the mode of payment, Simon stating it was paid by note made March 30, 1892, while Davis claims it was paid in cash at said date. Again, the parties disagree in respect to the amount of reduction reported by Davis to have been granted by the Criminal Court on the judgment, Simon stating that Davis told him it had been reduced to \$2,250, while Davis claims he told Simon the judgment had been reduced to \$2,500. Again, Simon affirms he paid Davis, December 17, 1891, on account of the judgment, the sum of \$1,500, while Davis denies this payment, and asserts that on that day he loaned Simon one thousand dollars, for which he took his note at sixty days. Again, Simon testifies that on March 30, 1892, he made to Davis a further payment of \$250 in cash, to be applied to said judgment, while Davis claims that on that day Simon paid him \$200 in cash, which was balance on his fee.

Again, Simon and Davis both agree that on March 30, 1892, Simon executed and delivered to Davis two notes for two hundred and fifty dollars each, and one for two hundred dollars. Davis swears that these three notes, amounting to seven hundred dollars, were delivered to him in payment

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of the balance due on the loan note. It will be noticed that these notes, in the aggregate, fall short of the balance due on the alleged loan note by the sum of fifty dollars, but Davis undertakes to explain that discrepancy by stating that Simon promised to pay him the sum of fifty dollars, which was the interest on the original loan, before the maturity of the last note. Simon swears that the two hundred and fifty dollars, in cash paid Davis on March 30, 1892, and the two notes for two hundred and fifty dollars each, delivered to Davis on that day, amounting to seven hundred and fifty dollars, was in settlement of balance due on the judgment. Simon swears that the third note for two hundred dollars, executed and delivered to Davis March 30, 1892, was in settlement of balance due on fee. Simon denies the alleged loan of one thousand dollars claimed to have been made him by Davis, and the alleged payment of fifty dollars as interest on said loan. The claim of Simon is that Davis has misappropriated twelve hundred and fifty dollars of Simon's money.

In this irreconcilable conflict in the testimony of the two principal actors in this transaction, the cardinal inquiry for the Court is to ascertain which one of the parties is sustained by the facts and circumstances disclosed in the proof and by the inherent probabilities of the case. It may be remarked at the outset that the testimony of Davis that he loaned Simon one thousand dollars, and took his note at sixty days, without security, is

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improbable; and the only witness who corroborates him is his brother, David Davis. It is improbable, in the first place, that Davis would have one thousand dollars deposited with his brother in the safe at B. Lowenstein & Bros., since the evidence shows that Davis and his brother each kept a bank account, and the safe in question was not a place for the deposit of money even by the firm of B. Lowenstein & Bros. It is improbable that Davis would lend Simon one thousand dollars without demanding security, when Davis knew at that very time of the existence of this large judgment against Simon in the Criminal Court, and when, in addition to this knowledge, his brother had just informed him that Simon owed B. Lowenstein & Bros. an account for \$2,280, which they had been trying to collect, and that he was indebted to other parties, which amounts he was wholly unable to pay.

Again, Davis claims that he knew, prior to making this loan, that Simon had some stock in a building and loan association, upon which he was trying to negotiate a loan, and yet Davis, with knowledge of Simon's ownership of this stock, did not ask that it should be hypothecated as collateral security for the loan he was about to make. In the face of all these facts, Davis testifies he was perfectly satisfied to make the loan without security. It is also a matter for observation that, notwithstanding Davis is shown to have kept a bank account, and to have carried on an extensive busi-

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ness with the bank, he does not claim to have deposited this \$1,050 note in the bank for collection, nor is there any record of any deposit of the \$300 which Davis claims Simon paid him on the loan note in the latter part of February. There is, however, a record in his bank book of the three notes executed by Simon on March 30, 1892.

The facts and circumstances already adverted to, we think, illustrate the inherent improbability of Davis' version of this transaction, and we find no testimony in the record which corroborates him on the fundamental facts of the controversy, excepting the evidence of his own brother.

We do not discredit the testimony of the brother simply on account of relationship, but we give it due consideration in our investigation of the facts, and in determining the question whether the theory of the Davis brothers is sustained by the preponderance of the evidence.

Our next inquiry is whether Simon is corroborated by material facts and circumstances presented in proof. The fact is incontrovertible that, on December 17, 1891, Simon borrowed from the Manhattan Savings Bank the sum of fifteen hundred dollars by hypothecating a building and loan association certificate of stock.

Samuel Hirsh testified that he assisted Simon in securing the loan from the bank, and that Simon told him on that day his object in borrowing the money was to pay it on the Criminal Court judgment.

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H. Simon, brother to Nathan Simon, testified that his brother told him on that day his object in wanting the money; and, after he had borrowed it from the bank, showed it to him, and told him he was going to pay it to Davis on the Lachman bond judgment. Nathan Simon, it will be remembered, testified that Davis told him on December 17 he must have one thousand five hundred dollars to pay on that judgment. Hon. Geo. B. Peters, Attorney-general of the Criminal Court, testified that Davis had promised that fifteen hundred dollars would be paid on the judgment on that day, so that the borrowing of fifteen hundred dollars on December 17 by Simon was in furtherance of the promise made by Davis to the Attorney-general of the Criminal Court. It is a striking coincidence that the sum claimed to have been borrowed by Simon on that day was the exact amount which Davis had promised the Attorney-general would be paid in on that day. The fact that Simon actually borrowed fifteen hundred dollars from the Manhattan Savings Bank on the seventeenth of December, 1891, is further established by the testimony of James Nathan, the cashier of the bank, and by the production in evidence of the original loan note itself, dated December 17, 1891. James Nathan also testified that, according to the best of his recollection, Simon told him, at the time, the object of borrowing the money was to pay it on the Lachman judgment.

Now, why should Simon borrow one thousand

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dollars from Davis for sixty days, and agree to pay him fifty dollars for the use of the money, which was at the rate of thirty per cent. interest, when the proof shows that, on that very day, Simon had borrowed fifteen hundred dollars from the bank for four months at eight per cent. interest? The proof shows that Davis only paid in one thousand dollars on the judgment, notwithstanding his agreement with the Attorney-general that he would pay in fifteen hundred (\$1,500) dollars on that day. Mr. Peters states: "He [Davis] asked me, if he would raise fifteen hundred dollars, if I would hold up on the balance. I asked him when that amount could be paid. He said within a day or two. I told him that, if he would pay that amount, so far as I was concerned, I would be willing to give Mr. Simon a chance to pay the residue of the bond. Mr. Davis came to see me on a certain day in December; it was the day the one thousand dollars were paid into Court. [This date is admitted by all parties to have been December 17, 1891.] Davis said to me the Simons did not have or could not pay but one thousand dollars. I told him our understanding had been that he was to pay one thousand five hundred dollars in. 'Well,' he said, 'they could not pay but this amount,' and he insisted that I would consent to let them pay in the one thousand dollars. I asked him when he could get this one thousand dollars. He said that afternoon or right away. * * * *

Mr. Davis came up within a short while afterward—

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quite late in the afternoon—and told me that he had paid the money to Mr. Hunter, the Clerk of the Court; paid the one thousand dollars. Within a few minutes,” continues the witness, “I chanced to meet Mr. Hunter, and he said the money had been paid in by Davis.” Mr. Peters states further, that, according to his recollection, “it could not have been *before* four o’clock in the afternoon when the money was paid in. It was quite late in the evening. I remember that distinctly.”

The evidence is convincing that at the time Davis was importuning the Attorney-general for permission to pay in one thousand dollars instead of fifteen hundred, as originally agreed, that Davis had already collected fifteen hundred dollars from Simon. This fact was, of course, not known to the Attorney-general. It will be remembered that Davis and his brother both testify that the sum of one thousand dollars was paid to the Clerk of the Criminal Court not later than half-past one o’clock of December 17, 1891. In this statement they are both contradicted by Attorney-general Peters, an entirely credible and disinterested witness, who testified, as already seen, that the money was not paid until quite late in the evening; certainly not before four o’clock.

Simon testified that the money he borrowed from the bank was in three packages of five hundred dollars each. Hunter, the Deputy Clerk of the Criminal Court, testified that the sum of one thousand dollars paid into the Criminal Court by Ralph

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Davis was, to the best of his recollection, in two packages of five hundred dollars each.

Another significant circumstance in this connection is, that James Smith, cashier of the Memphis National Bank, testified that Davis kept his account with said bank, and that, on December 18, 1891, the next day after this money is claimed to have been paid him, he made a deposit in that bank of five hundred dollars, and the witness produced the deposit ticket, in Davis' handwriting. Davis denies that this deposit of five hundred dollars was part of the money collected from Simon. He claims that part of it was the sum of three hundred and twenty-five dollars left in the safe at Lowenstein's, after the loan of one thousand dollars to Simon, and which his brother handed him the next day, and he thinks the balance of that deposit was made up of fees collected at that time. No specific amounts in fees which, added to the three hundred and twenty-five dollars handed him by his brother from the safe, would amount to five hundred dollars are shown in evidence, and we think the explanation of this deposit is unsatisfactory. Without further discussion of the facts, we are constrained to believe that the finding of the Circuit Judge is well supported by the weight of the evidence.

It is unnecessary, in this view of the case, to go into an examination of the charge made in the complaint, that Davis procured the issuance of an execution against his client for the collection of four thousand dollars, balance of Criminal Court judgment. Affirmed.

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DOLLMAN *v.* COLLIER.

(Jackson. May 31, 1893.)

1. MECHANIC'S LIEN. *Abandoned and lost, when.*

A contractor's lien upon property for the value of labor and materials expended in its improvement, under contract with the owner, is abandoned and lost when the contractor seeks, by attachment suit in equity to enforce his lien, but fails to have the attachment issued and levied upon the property.

Code construed: § 2747 (M. & V.).

Cases cited and approved: Barnes *v.* Thompson, 2 Swan, 312; Brown *v.* Brown, 2 Sneed, 432; McLeod *v.* Capel, 7 Bax., 199; Shelby *v.* Hicks, 5 Sneed, 200.

2. SAME. *Contractor entitled to personal decree.*

But the contractor is entitled, in such case, under the prayer for general relief, to a personal decree against the owner of the property for the amount due.

Case cited and approved: Dodd *v.* Bentall, 4 Heis., 601.

3. CHANCERY PRACTICE. *Effect of concurrent finding of Master and Chancellor.*

Doctrine re-affirmed that concurrent finding of Master and Chancellor upon matters of fact has the weight of the verdict of a jury.

Cases cited and approved: Brown *v.* Daily, 85 Tenn., 218; Turley *v.* Turley, 85 Tenn., 251.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
W. D. BEARD, Ch.

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MYERS & SNEED and GANTT & PATTERSON for Dollman.

SMITH & TREZEVANT and W. W. GOODWIN for Collier.

A. D. BRIGHT, Sp. J. Complainant filed this bill against Defendant Collier *et al.*, seeking to enforce a mechanic's lien on the lot and building known as the Appeal Building, situated in Memphis, Tenn., on the corner of Main and Jefferson Streets. Complainant, being a carpenter and contractor, entered into a contract, in July, 1888, with Defendant Collier to furnish the material and do the carpenter's work in framing and covering said building. This work was done, accepted, and paid for; and on May 20, 1889, complainant contracted to do the inside wood-work, etc., of said building according to the plans and specifications of the architect, E. C. Jones. This bid was accepted at \$13,249. Complainant again bid, on June 12, 1889, on some extra work for the sum of \$3,290, the two bids on contract aggregating \$16,590.

Complainant went to work under his contract, furnishing the material and doing the work, but before he had completed it, he was discharged by Collier, and not allowed to complete his contract. Though complainant stood ready, willing, and able to complete the work and carry out his contract, he was not allowed to do so by Defendant Collier. Thereupon he filed this bill claiming a mechanic's lien for the amount due him for the materials

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furnished and work done, etc., and for damages against Collier for breach of contract.

Collier answered denying the equities of the bill, and set up a counter claim as offset against complainant for damages for negligent and defective work, etc.

Complainant prayed for an attachment, but none ever issued, nor was any attachment ever levied on the property, nor was any injunction issued.

The Chancellor adjudged that complainant was entitled to recover of Collier for material and labor furnished, and decreed a lien as mechanic, and that he was entitled to recover damages, etc., for breach of contract, and referred the matter to the Master to take proof and report the amount due complainant, and also amount of damages on breach of contract. The Master reported \$9,867.85 due for work and material, etc., and \$2,500 damages, aggregating \$12,367.85. To this report various and numerous exceptions were filed by Collier. The Master overruled all of the exceptions, and defendant appealed to the Chancellor.

Upon the appeal to the Chancellor, he sustained the report of the Master in all things except item No. 32 of thirty dollars. With this exception the report was confirmed by the Chancellor.

The Chancellor then pronounced a final decree (deducting the thirty dollars) in favor of Dollman against Collier for the sum of \$12,337.85, with interest from January 19, 1893, and all costs, and awarded execution. The Chancellor also decreed

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that \$9,837.85 of the \$12,337.85 was a mechanic's lien on the lot and building, situated on the northwest corner of Main and Jefferson Streets, City of Memphis, Shelby County, Tennessee, and setting out the boundaries of same. This decree of mechanic's lien was by the Court decreed to be subordinate to a trust deed to John Dunn, trustee, executed by Collier and wife to said Dunn to secure a debt for about \$66,000, and the trustee and beneficiaries are made parties to this suit. And the decree further recites that Collier and wife had, pending this suit, conveyed the property to the Memphis Appeal Company, and that the Appeal Company had executed a trust deed on same to secure a large indebtedness, and that a suit was pending in the United States Court at Memphis against Collier, Dollman, and all other parties interested to foreclose said trust deed to said Dunn, and to sell said lot and building for payment of said debt, and to marshal the liens and securities on same; and, in view not to sacrifice said property, the Court ordered and decreed no sale of said property to be made at present, but said lien will be and is declared on said property in favor of complainant for the amount aforesaid, and will be enforced, and retained the cause in Court for this purpose, etc.

Defendant prayed an appeal from this decree, but failed to perfect his appeal, and the defendant has brought the case here by writ of error, and has assigned errors. It is insisted by defendant

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that the Chancellor was in error in decreeing and declaring a mechanic's lien in favor of complainant, he having failed to have an attachment issued and levied upon the property.

The Code, M. & V., § 2747, in regard to mechanic's lien, says it "shall be enforced by attachment, either in law or equity, or by judgment and execution at law, to be levied upon the property on which the lien is."

This Court, in *Barnes v. Thompson*, 2 Swan, page 312, says, in construing mechanic's lien law: "The benefit of the lien given the mechanics can only be preserved by attachment." Also holding that the word "may" is generally construed in statutes to have the same meaning as the word "shall."

Again, in *Brown v. Brown*, 2 Sneed, 432, this Court, construing the mechanic's lien law, the case of *Barnes v. Thompson* is cited and approved on this point, and the Court says: "And, if the plaintiff desires to secure and enforce his lien for the satisfaction of the judgment to be rendered in the case, he must also cause an attachment to be levied on the property." To the same effect is *McLeod & McGrath v. Capel*, 7 Bax., 199, and 5 Sneed, 200.

Thus, it will be seen that, in order to preserve or enforce this lien in this case, an attachment must issue and be levied upon the property. This complainant has not done; hence, he is not entitled to the lien, he having lost or abandoned his lien. Therefore, the Chancellor was in error in

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decreeing the lien and declaring same a lien on the property, and decreeing a sale of same.

It is insisted by defendant that no personal decree can be rendered in this case against defendant; that his bill is framed to enforce a mechanic's lien, and that a personal decree cannot be rendered on the prayer for general relief, as it is inconsistent with the prayer for enforcement of the lien, and that there is error in amount of decree for complainant. While on the other hand, the complainant insists that he is entitled to the personal judgment, and to have execution issued and levied upon the property described in his bill, and thus enforce the lien under latter portion of § 2747 of Code (M. & V.).

It is true, and we so hold, that complainant has *lost* his mechanic's lien, by a failure to have an attachment issued and levied upon the property. We also hold that complainant is entitled to a personal decree for his debt, not, however, a personal judgment in aid of the mechanic's lien. Suppose complainant had caused an attachment to issue, and it had been levied upon the property, and, upon final decree, for some cause, the lien had been denied him, could he then ask for a personal judgment for his debt, under prayer for general relief, and have execution issued thereon and levied upon the specific property and enforce the lien that was denied, all under the prayer for general relief? Unquestionably not; yet this is what complainant is asking.

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Under a prayer for general relief, parties filing vendor's bill, failing to establish the vendor's lien, are entitled to a personal judgment against the defendant; so in cases of bills to set aside conveyance for fraud, ordinary attachment bills, etc. So in the present case, we think he is entitled, under the prayer for general relief, to a personal judgment. 4 Heis., 601. The judgment, however, is not such a judgment as will bring the case under the latter part of § 2747 (M. & V.) Code. It is not to operate as a judgment and execution to be levied upon the property, within the meaning of the Act to enforce a mechanic's lien. He has no lien to enforce. The bill is not framed with such a view. The bill, in its primary object, is entitled to enforce the lien by attachment only. Under the prayer for general relief, it may be treated as an ordinary action of debt, without reference to any lien. We hold that he has failed to show himself entitled to the primary relief sought, because he has not caused the attachment to issue and be levied upon the property. It is not a suit to obtain judgment and have execution levied upon the property to enforce a mechanic's lien; nor can this be done under prayer for general relief. Complainant is entitled to a general judgment and execution, and not a judgment and execution to be levied upon the specific property under the statute to aid or enforce the mechanic's lien.

The Master's report having been concurred in

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by the Chancellor, has the weight of the verdict of a jury. 1 Pickle, 218, 251.

We have examined the proof, and find that the proof sustains the Master's report, and action of the Chancellor confirming same.

The decree of the Chancellor decreeing and declaring a mechanic's lien in favor of complainant, and decreeing that he is entitled to have the property sold to satisfy same, is reversed.

With this modification, and with the qualifications set out herein, the decree of the Chancellor decreeing the personal judgment and awarding execution herein, will be affirmed.

Complainant will pay the costs of this Court, and the costs of the Court below will be paid as adjudged by the Chancellor.

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MITCHELL *v.* STATE.

(*Jackson.* June 1, 1893.)

1. CRIMINAL PRACTICE. *Continuance.*

An application for a continuance will be disallowed, if not supported by an affidavit.

2. SAME. *Severance.*

An application for a severance will be disallowed, if not supported by an affidavit.

3. LARCENY. *What constitutes.*

One who obtains money by false and fraudulent representations that he is an officer of an association owning large tracts of land, on which they desire to locate poor colored people, and that, if the other will give him his money, he will move him upon the land and stock it for him, allowing him to pay for it as he is able, is guilty of larceny, under § 5445 (M. & V.) Code, providing that "if a contract of loan for use, or of letting and hiring, or other bailment or agency, be used merely as the means of procuring possession of property, with an intent to make a fraudulent appropriation at the time, it is larceny."

Code construed: § 5445 (M. & V.); § 4679 (T. & S.).

Cases cited: Felter *v.* State, 9 Yer., 397; Coldwell *v.* State, 3 Bax., 430; Defrese *v.* State, 3 Heis., 61; Robinson *v.* State, 1 Cold., 120; Collins *v.* State, 15 Lea, 69.

FROM SHELBY.

Appeal in error from Criminal Court of Shelby County. J. J. DuBose, J.

W. A. DUNCAN for Mitchell.

Attorney-general PICKLE for State.

Mitchell *v.* State.

CALDWELL, J. Stanley Mitchell and James Washington have appealed in error from a joint conviction for the larceny of twenty dollars, the money of Patton Walker, the prosecutor.

They seek a reversal upon three grounds: (1) Because the trial Judge refused them a continuance; (2) because he refused them a severance; (3) because the evidence, as they contend, does not sustain the verdict.

First.—The motion for continuance was properly disallowed, because not supported by an affidavit.

Second.—The application for a severance was properly disallowed for the same reason.

Third.—It is well established by the proof that plaintiffs in error and the prosecutor are negroes; that on May 15, 1892, Mitchell and Washington went together to the house of Walker, a newcomer, in the city of Memphis, and represented to him that they were President and Secretary, respectively, of an Anti-Oklahoma Association, which association they said owned a large tract of land near Memphis, in Shelby County, upon which they desired to locate poor colored people, and give them homes on easy terms; that they further said to him that, if he would turn over to them such money as he then had, they would move him and his family upon that land and stock it for him, and allow him to pay for the land and stock as he might become able; that believing their representations to be true, Walker and his wife, at once, turned over to Mitchell and Washington the

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sum of twenty dollars, all the money they had; that Mitchell and Washington went away with the money, never returned or accounted for any part of it, but appropriated it as their own, and never offered to comply with the promise under which they received it.

The proof further shows that there was, in reality, no such association as that of which the plaintiffs in error claimed to be officers; that they knew all of their representations to be utterly false, and that they made them alone for the fraudulent purpose of obtaining the prosecutor's money and applying it to their own private uses.

These facts constitute larceny, under § 4679 of the Code, which is in the words following: "If a contract of loan for use, or of letting and hiring, or other bailment or agency, be used merely as the means of procuring possession of property with an intent to make a fraudulent appropriation at the time, it is larceny."

From the prosecutor's stand-point, Mitchell and Washington, upon their own suggestion, became his bailees and agents to receive his money and turn it into the treasury of the supposed association in his name and for his benefit. With no other view did he hand them his money; in no other relation can they be held to have received it. In legal contemplation, the transaction constituted a contract of bailment and agency. By using that contract merely as means of obtaining possession of the prosecutor's money, intending at

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the time to make a fraudulent appropriation of it, the plaintiffs in error became guilty of larceny under the statute just quoted.

That statute seems to have originated with the Code of 1858, and was, no doubt, intended, primarily, to change the rule announced in *Felton v. The State*, 9 Yer., 397, and other cases therein cited, to the effect that there can be no larceny in the absence of a technical trespass, though the party charged be shown to have obtained possession of the property by fraud upon the owner, and with a felonious intent of converting it to his own use.

An application of the statute to facts practically identical with those disclosed in Felton's case, with a result exactly the reverse, is found in 3 Baxter, at page 430.

In Defrese's case it was said that the trespass in such a case is in the fraud and deception practiced upon the owner, by which the possession was acquired with felonious intent; and that the statute is but a return to the ancient principles of the common law. 3 Heis., 61, 62.

The statute was not mentioned in the case of *Robinson v. The State*, 1 Cold., 120, and need not have been, for the reason that the facts did not call for or justify its application. Robinson was not shown to have practiced any fraud or deception in obtaining possession of the trunk from which he took the prosecutor's money, but only to have taken the money and converted it to his own use, after the owner had, of his own accord,

Mitchell *v.* State.

placed the trunk in his charge for safe-keeping. This Court held that the taking of the money, under such circumstances, constituted the crime of larceny at common law, only the *trunk*, and not the *money*, having been placed in the defendant's keeping. *Ib.*, 121, 122.

The statute seems not to have been considered, or, if considered, it was not applied, in the case of *Collins v. The State*, 15 Lea, 69. The facts stated in the report of that case do not bring it clearly within the operation of the statute in question.

Mitchell and Washington are also under conviction, upon another indictment, for the larceny of thirty-nine dollars, the money of Eulos Rodgers. They are shown to have obtained his money at the same time, with the same intent, and under precisely the same circumstances as they received that of Patton Walker, and to have converted it to their own use, as they did his. In fact, the two cases were tried together, upon evidence largely the same; hence, what has been said of the one case in this opinion is equally applicable to the other one, and need not be repeated.

It was proper that the judgment in one of the cases should provide that the imprisonment thereunder should commence at the expiration of the imprisonment imposed in the other case, the offenses being separate. Code, § 5228.

The punishment in each case was fixed at five years in the State penitentiary.

Affirm both judgments.

Graham *v.* Stull.

* GRAHAM *v.* STULL.

(Jackson. June 3, 1893.)

1. YEAR'S SUPPORT. *Widow of non-resident not entitled to.*

Our statute providing for year's support for widow out of the estate of her deceased husband does not embrace non-residents.

Code construed: § 3125 (M. & V.); § 2285 (T. & S.).

Cases cited: Curd *v.* Curd, 9 Hum., 171; Sanderlin *v.* Sanderlin, 1 Swan, 441; Bayless *v.* Bayless, 4 Cold., 359; Vincent *v.* Vincent, 1 Heis., 333; Turner *v.* Fisher, 4 Sneed, 209; Pride *v.* Watson, 7 Heis., 232; Rice *v.* Hunt, 7 Lea, 33; Rhea *v.* Greer, 86 Tenn., 59; Railroad *v.* Kennedy, 90 Tenn., 185; Lisenbee *v.* Holt, 1 Sneed, 50; Hawkins *v.* Pearce, 11 Hum., 44; Emmett *v.* Emmett, 14 Lea, 369; Prater *v.* Prater, 87 Tenn., 78; Holland *v.* Railroad, 16 Lea, 418; Carson *v.* Railroad, 88 Tenn., 646.

2. SAME. *Statutes providing, liberally construed.*

Doctrine re-affirmed that statutes providing for year's support are construed liberally in favor of the right.

Case cited and approved: Rhea *v.* Greer, 86 Tenn., 59.

FROM SHELBY.

Appeal from Probate Court of Shelby County.
J. S. GALLOWAY, Ch.

W. G. WEATHERFORD and JNO. P. EDMONDSON for
Graham.

* The right of a non-resident widow to statutory allowance is the subject of a note to the above case in 21 L. R. A., 241.—REPORTER.

Graham v. Stull.

RANDOLPH & SON for Stull.

WILKES, J. This is an appeal from a judgment of the Probate Court of Shelby County, allowing a year's support to the defendant in error, Mrs. Addie B. Stull, as the widow of Dr. G. T. Stull.

Dr. Stull, at the time of his death, was a resident of Crittenden County, Arkansas, and had been residing there for a number of years, though frequently in Tennessee, where both he and his wife resided before their marriage. He left an informal will, which was probated in Crittenden County, Arkansas, by W. S. Graham, the executor named therein, and a transcript of its probate was filed in the office of the Clerk of the Probate Court of Shelby County, and Graham was, by that Court, also appointed executor of the will in Tennessee.

Mrs. Addie B. Stull, the widow, dissented from the will, and filed her petition in the said Probate Court of Shelby County, asking for a year's allowance out of the estate of her deceased husband in Tennessee, according to the statutes of Tennessee. The assets consist of cash collected from W. N. Brown & Co., and in the hands of Graham, the executor, amounting to something over \$3,000, and one second-hand piano.

The Probate Court appointed Commissioners to set apart the year's support. A few days thereafter, W. S. Graham and wife filed a paper in that Court, asking that the petition be not allowed, but dismissed. Mrs. Graham, the wife of Executor Graham, is the only child and heir of Dr. Stull.

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The matter proceeded somewhat irregularly to trial. The Commissioners made report March 14, 1893, setting apart to Mrs. Stull \$2,500 for her year's support. To this report Graham and wife excepted. An agreed statement of facts was filed in the cause, and considered on the hearing. The Court below confirmed the report of the Commissioners, and directed that the allowance be paid by the executor, Graham, to Mrs. Stull, the widow, out of the cash in his hands belonging to the Tennessee estate.

From this judgment Graham, as executor, and Graham and wife appealed, and have assigned various errors, only one of which it is necessary to mention, as it is decisive of the entire controversy. It is, in substance, that the statute of Tennessee providing a year's support for a widow was intended to apply, and does apply, exclusively to a widow residing in Tennessee, and not to a widow of any person residing in an alien State at the time of his death.

From the agreed statement of facts it appears that certain proceedings were had in Arkansas, in the Courts of Crittenden County, under which the widow made an election to be endowed out of her husband's estate in Arkansas, and executed a quit-claim to the heir of all her rights under the will of her deceased husband, and set up her claim to a child's part—in this instance being one-half of the entire estate, real and personal. Under decrees in that Court, about \$1,246.37 has been paid to

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the widow pending further proceedings, and the settlement of a controversy between the widow and Graham and wife in regard to the rents of the Arkansas lands.

Mrs. Stull, the widow, insists that she is entitled to all the benefits secured to widows in Tennessee under the statutes, without reference to any thing that may be done in Arkansas under the statutes of that State.

Whether Mrs. Stull is entitled to a year's support out of the assets in Tennessee depends on the construction of the statutes of this State. By the Code, § 2285 (M. & V. compilation, § 3125), it is, in substance, provided that upon the application of the widow of an intestate, or of a widow who dissents from her husband's will, the County Court, through commissioners, shall set apart to her, for the use of herself and family, a year's support out of any estate left by the deceased. This allowance is made irrespective of the condition of the estate as to solvency or insolvency, and the amount depends upon the number of the family and their previous mode of life during the life-time of the deceased, and the property thus set apart does not enter into the administration of the estate, and does not go into the hands of the administrator, and, if it comes into his hands, may be recovered therefrom by the widow, and it is in nowise subject to the debts of the deceased.

The law is, in a certain sense, a statute of exemption, and is a provision made with reference

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to the affliction, helplessness, and necessities of widows immediately after the death of their husbands. Its nature and character are fully explained and applied in many cases in our State decisions. *Curd v. Curd*, 9 Hum., 171; *Sanderlin v. Sanderlin*, 1 Swan, 441; *Bayless v. Bayless*, 4 Cold., 359; *Vincent v. Vincent*, 1 Heis., 333; *Turner v. Fisher*, 4 Snead, 209; *Pride v. Watson*, 7 Heis., 232; *Rice v. Hunt*, 7 Lea, 33; *Rhea v. Greer*, 2 Pickle, 59; *Railway Co. v. Kennedy*, 6 Pickle, 185.

The statute, as well as all other statutes of exemption, should be liberally construed. *Rhea v. Greer*, 2 Pickle, 59.

But the important question remains, Is it a provision intended to apply alone to cases where residents of the State may die leaving widows and families residing in the State, or does it embrace also widows of deceased persons who were non-residents when they died but owned property in Tennessee?

This is a new question in Tennessee, and seems to have been rarely considered in other States.

It has been held that the widow of a non-resident intestate may sue for her year's allowance for support in Georgia, there being property there, and especially if there are no debts in the State of domicile, but the amount to be recovered must be regulated by the law of the State. *Mitchell v. Word*, 64 Georgia, 208; 3 Am. & Eng. Ency. of Law, page 651.

The case of *Kapp v. The Public Administrator*,

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reported in 2 Bradford's Surrogate Reports (N. Y.), in the matter of the estate of Peter Eikes, deceased, is one resting on peculiar circumstances. In that case, the intestate died at sea, while on his way from Germany to the United States, having left his wife and children in Germany. Certain assets, on board the vessel, came into the hands of the Public Administrator at New York, and creditors having appeared to claim satisfaction of their demands, the question was raised whether the widow was entitled to a year's support. There was no contest between the widow and heir or distributee. The Court held that she was so entitled. It is evident, in that case, that, while the intestate had not, in fact, acquired a domicile in New York, yet he had left his former home in Germany for that purpose, and was engaged in the execution of that purpose when he died. He was virtually a resident of New York, under the circumstances, and entitled to the protection of its laws in favor of residents.

In *Shannon v. White*, 109 Mass., 146, it was held that, under the statutes of Massachusetts, the widow of a non-resident was not entitled to the allowance provided by the statute.

The statute of North Carolina provides for making an allowance from a decedent's estate to the widow, upon application by her to a Justice of the Peace of the township in which the deceased resided, or some adjoining township, and it was held that this provision did not apply to the case

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of a decedent who resided and died in another State, although having property in North Carolina, and although the widow subsequently moved into that state. *Simpson's Adm'r v. Cureton*, 2 S. E. Rep., 668; *Medley v. Dunlap*, 90 N. C., 527.

The decisions of other States are based upon the statutes of those States, and cannot be controlling in this, and are of but little aid. Nor are we aided to any extent by the decisions of our own or other States regarding dower to non-resident widows, inasmuch as dower is a common law right, not dependent for its existence upon statute, though largely regulated by statute in each State as to its mode of assignment, and as to the property out of which it may be assigned. The statute, in its object and purpose, is very similar to statutes exempting a homestead and certain personal property to the widow and children of deceased persons.

It has been almost uniformly held in the Courts of Tennessee, and in the Courts of other States of the Union, that such statutes, being different in the several States, are not intended and do not apply to citizens of other States; that such laws, upon the one hand, have no extraterritorial force, and, on the other, are not designed to extend their benefits to non-residents. *Lisenbee v. Holt*, 1 Snead, 50; *Hawkins v. Pearce*, 11 Hum., 44; *Emmett v. Emmett*, 14 Lea, 369; *Prater v. Prater*, 3 Pickle, 78; *Holland v. Railroad*, 16 Lea, 418; *Carson v.*

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Railway Co., 4 Pickle, 646; Succession of Christee, 96 Am. Dec., 413, and note.

We are of opinion that the statute providing for a year's support for the widow of a deceased person applies only to the widow of such person as may be residing in Tennessee at the time of his death, and does not apply to the widow of a non-resident. Holding this view of the case, it is immaterial what provision may have been made, or benefits received, by a non-resident widow in the State of her residence, or whether she has, in the State of her domicile, received any thing, or is entitled to receive any thing, as a year's support or widow's allowance.

We are therefore of opinion that the Court below was in error in giving a year's support to Mrs. Stull out of the assets of her husband's estate in Tennessee; and the judgment of the Court below is reversed, and the petition of the widow dismissed with costs.

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L. & N. RAILROAD v. M. & T. RAILROAD.

(Jackson. June 13, 1893.)

1. RAILROADS. *Rights of, under contract with city permitting construction of track upon streets for joint use.*

Under a contract by a city with a railroad company, in accordance with which it permits the company to construct a track through its streets, on condition that the company permit any other railroad company to use the track, on paying a *pro rata* share of the cost of construction, without placing any limit on the time when other roads may come in, or their number, a delay in making application of nine years after its completion, during which two other roads have come in, is no ground for excluding an applicant where it is proved that the line will not be overburdened by its entrance, or that the parties or Court have power to prevent such result. (*Post, pp. 683, 684, 686, 687.*)

2. SAME. *Specific performance of contract for joint operation of road.*

A contract providing for the joint ownership and operation of the same line of road by several railroad companies, each having an undivided interest therein, is capable of specific performance. (*Post, pp. 688, 689.*)

Case cited and approved: 138 U. S., 1, 50.

3. SAME. *Same. Proper decree.*

A decree in a suit by a railroad company for the specific performance of a contract providing for the use by any railroad company of a line of road constructed by another company on payment of a *pro rata* share of the cost of construction and other expenses, of which two other companies have already availed themselves, properly directs the payment of the *pro rata* share into Court, instead of directly to the original company, especially where mortgages have been given upon the property. (*Post, p. 689.*)

4. SAME. *Have equal rights under contract with city for joint operation of road.*

Under a contract by a city with a railroad company for the construction of a track through its streets, containing a provision that it shall

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allow any other railroad terminating in the city to use the road, upon payment of a *pro rata* share of the cost, any other company, upon entering, is not subordinate to the original builder. (*Post*, p. 690.)

5. SAME. *Estoppled to exclude other companies from use of road.*

A railroad company which constructs a road through the streets of a city, under a contract that it will permit any other railroad company to use the track upon payment of a *pro rata* share of the cost, is estopped from excluding other companies on the ground that it purchased or condemned private lands for the use of the road for about one-seventh of the way. (*Post*, p. 690.) /

6. SAME. *Same.*

A railroad company cannot exclude another company from using a track built by it through the streets of a city, under a contract with the city providing for the use of the track by any other company, on the ground that the applicant, by the terms of its charter, can use only animal power, when such applicant has for years used steam power and the city sanctions such use by joining in the petition and otherwise. (*Post*, p. 690.)

Case cited and approved: Railroad v. Bingham, 87 Tenn., 527.

7. SAME. *Foreign company not excluded from benefit of contract, when.*

A railroad company which has a contract with a city for the construction of its road through the city streets, providing that the company shall allow any other company terminating in the city to use the tracks on payment of a *pro rata* share of the cost, cannot exclude a foreign railroad company seeking to obtain such use, upon compliance with the provisions of the contract. (*Post*, pp. 690-692.)

8. SAME. *Correct decree.*

A decree that a railroad company, upon being allowed the use of a track through a city, under a contract by its original builder with the city providing that it shall allow any other railroad company to use its tracks "upon payment of a *pro rata* share, not exceeding the cost of constructing such track, bridges, depot houses, and other expenses thereunto pertaining," shall pay one-fourth of the operating expenses so long as it, the original road, and two other lines which had previously entered on the use of the track, shall continue to use them, is proper. (*Post*, p. 693.)

9. FOREIGN CORPORATIONS. *Right of foreign railroad to sue in this State.*

When the suit of a foreign railroad corporation was brought prior to passage of the Act 1891, Chapter 122, or when it does not affirma-

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tively appear that the company has not complied with the requirements of that Act, the company's right to maintain the suit cannot be questioned upon the ground of non-compliance therewith.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
W. D. BEARD, Ch.

JOHN P. HOUSTON and TURLEY & WRIGHT for Complainant.

HOLMES CUMMINS and C. F. VANCE for Defendant.

WILKES, J. On the twenty-first day of June, 1880, the Mississippi and Tennessee Railroad Company made a contract with the Taxing District of Shelby County to construct what is called, in the written agreement, a "Union Passenger and Freight Railroad" through the city of Memphis, from a point in the southern to a point in the northern part of the city.

By the sixteenth section of the contract it is provided that the Mississippi and Tennessee Railroad Company shall permit any other railroads terminating in the Taxing District of Memphis to use and enjoy said track and the rights and privileges granted, upon payment by such other rail-

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road company to the Mississippi and Tennessee Railroad Company of a *pro rata* share, not exceeding the cost of constructing said track, bridges, depot, houses, and other expenses thereto appertaining, the franchise to extend for forty years. The road was to be a single track, and was to be so operated that trains of cars should not be run at intervals of less than thirty minutes, nor so close together as to impede travel on the streets crossed by the railroad nor on the levee.

Under the authority conferred by this contract, and in accordance with its provisions, the Mississippi and Tennessee Railroad Company constructed the road, and, after it was finished, the Chesapeake, Ohio and South-western Railroad Company and the Louisville, New Orleans and Texas Railroad Company each purchased a one-third interest therein, paying to the Mississippi and Tennessee Company one-third of the cost of construction. These several railroads were afterward leased or mortgaged, the details of which are not now material.

In July, 1889, the Louisville and Nashville Railroad Company was granted permission by the Taxing District of Shelby County to buy an interest in the line under said contract, and to use the name of the taxing district in any litigation necessary to secure the interest.

Thereupon, the Louisville and Nashville Railroad Company applied to the defendant companies, asking to be allowed to pay its *pro rata*, and have the joint use of said track, which was refused, and

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this bill was thereupon filed to attain such interest and enforce said contract.

Both the Louisville and Nashville Railroad Company and the Taxing District of Shelby County are parties complainant to the bill, and the prayer is that the Louisville and Nashville Railroad Company be allowed to purchase an interest of one-fourth in said line upon the payment of its *pro rata* share, according to the terms of the contract, the amount to be fixed by the Court, upon proof, and that it have such rights and be subject to such conditions as are imposed by the contract upon the Mississippi and Tennessee Railroad Company.

The defendants demurred to the bill, on the ground that the Louisville and Nashville Railroad Company had not made sufficient tender and offer to be bound by the terms of the contract originally made with the city, whereupon complainants tendered an amended bill, meeting these objections, and asked to be allowed to file the same, but the Chancellor declined to allow it to be filed, and overruled the demurrer, on the ground that the original bill was sufficient to meet all the objections raised.

It appears that a small part, perhaps one-seventh, of the right of way for the railroad line is over private property, bought or condemned by the Mississippi and Tennessee Railroad, for track purposes, and the remainder is over the streets and other public property of the taxing district.

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Various defenses were made by demurrer and answers, and much proof was taken, and, on final hearing, the Chancellor granted the relief prayed for, and ordered a reference to ascertain the amount that should be paid by the Louisville and Nashville Railroad Company, pending which the defendants prayed an appeal to this Court, and have assigned separate errors, raising many objections, which will be noticed so far as necessary to a disposition of the case.

It is insisted that for thirty years the Louisville and Nashville Railroad Company has operated a line of road running into the city of Memphis before this belt or connecting line was built, and that it has waited nine years after the line was completed before claiming any rights; that in the meantime two other roads have come into the joint ownership of the line under the contract, and that the reservation in the contract in favor of other lines has thus been exhausted, and the Louisville and Nashville Railroad Company cut off by its own laches and prior occupation; and that the line is already burdened with as much traffic as it can accommodate, and that the admission of another road would be burdensome, and impair the efficiency and use of the line for purposes of travel and traffic.

It will be noted that the contract between the taxing district and the Mississippi and Tennessee Railroad Company places no limit on the time when other roads may come in under the contract,

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nor the number of roads that may come in, and we can see no ground for excluding the Louisville and Nashville Railroad Company, unless, as a matter of fact, its admission will overburden the line, if, indeed, that would furnish a sufficient reason. This is a question of fact, and on it much proof has been taken, and the Chancellor was of opinion from this proof that defendant's contention on this point was not sustained, and we are of opinion that he is clearly sustained by the weight of the reliable proof introduced.

Nor or we able to see how the defendant companies are in any way injured or prejudiced by the delay of the Louisville and Nashville Railroad Company to come in under the contract, as they have been in possession and occupancy of the line and enjoying its benefits in the meantime.

It further appears that the cars of the Louisville and Nashville Railroad Company are now passing over the line, and paying toll therefor to the defendant companies. It is also made to appear that the capacity of the line could be largely increased, if the operation of the same was under one management, controlled by the several parties interested, instead of being operated by each company independently of the others.

It was evidently the object of the contract, so far as the taxing district is concerned, to furnish a convenient means of passage through the city over a line connecting the main lines of railroad north and south, thus making a matter of benefit

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and convenience to both the city and the railroad companies, and the city has the right to enforce the contract in such manner as to make the greatest convenience, and reap the greatest results to the public, there being no valid objection in the way. *Joy v. St. Louis*, 138 U. S., 1 to 50.

It is insisted, however, that the Courts cannot properly enforce the contract, because it would involve a continuing oversight, and the enforcement of personal services and continuing duties, which the Courts will not undertake.

We can see no valid reason why several owners may not operate and own the same line of road, each having an undivided interest therein, in the same way that any other easement or property might be owned and operated by several persons. This, in fact, is now being done over this line by the three roads that have already acquired an interest therein. We can see no reason why several companies may not own in common this line of road, as well as they could a bridge or a union depot, or, as we often see, a common entrance or stairway to several buildings owned by different parties.

From the nature of this case, it is impracticable for the several roads each to have a separate line of road through the city, and the different companies, as well as the city and public generally, are interested in having a connecting line open, under proper regulations, to the use of all, and not to be monopolized by one to the injury

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of others, and the detriment of the public. This was the controlling idea in the inception of the contract, and, even if the line should become overburdened, it would not be ground to exclude any, but rather that each should be accommodated as far as practicable.

We do not think such a condition is presented under the facts in this case. Certainly the relative rights and obligations of the parties can be fixed by agreement of parties if practicable, and by the interposition of the Courts if necessary.

We are of opinion that the decree of the Chancellor is correct in directing the *pro rata* to be paid into Court by the Louisville and Nashville Railroad Company instead of being paid direct to the Mississippi and Tennessee Company.

Two other companies have acquired an interest in the property since it was built, and mortgages have been executed covering this line, and it is eminently proper that the fund be paid into Court and paid out to the several parties entitled, as the proof may show their rights therein. It is also altogether proper that the Louisville and Nashville Railroad Company, on entering into the joint ownership of the track, should pay one-fourth of the operating expenses so long as the four roads are interested therein. If other roads should hereafter be admitted under the contract, it would be necessary that the *pro rata* of expenses be readjusted to meet the changed condition of ownership.

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We cannot accede to the proposition that the property and its management should remain in the original builder, the Mississippi and Tennessee Railroad Company, and that other companies should come in subordinate thereto. This is evidently not the arrangement originally contemplated by the contract, nor would it be best for the interest of the city or the public, but there is nothing to prevent one general management by the several roads under their joint supervision.

It is no bar to the relief sought that a portion of the right of way of the line is over private grounds, which have been purchased or condemned by the Mississippi and Tennessee Company. If there were any thing in it as an original proposition, it cannot now be set up in face of the agreement made with the taxing district to allow other roads to enter upon the line. It was in consideration of this agreement that the right of way was granted by the city over its streets and other public property, and defendants are estopped to exclude others by the very terms of the contract.

Again, it is insisted that the Louisville and Nashville Railroad Company is a foreign corporation; that it only has a terminus in Memphis by virtue of its control of the Memphis and Ohio Railroad, and that it can only operate its line under the provisions of the charter of the latter-named company, afterwards called the Nashville and Memphis Railroad Company, which provides that a

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line may be operated west of Bayou Gayoso only by animal power, and not by steam. The argument is, that if the Louisville and Nashville Railroad Company is let into the joint ownership of this line, it can only operate it by animal power, and not by steam, and this would not only be impracticable, but would prejudice defendants in their use of the line if it were practicable.

In considering this question, it is well to note that the Louisville and Nashville Railroad Company is now running its cars over this line propelled by steam, not only by sufferance of the defendant companies, but under contract with them, paying a fixed tax or rental therefor, and the city is not only not complaining, but is joining in this action to enable the complainant railroad to more satisfactorily operate the same by steam.

We think this right to operate a line west of Bayou Gayoso by the Louisville and Nashville Railroad Company, as the successor of the Nashville and Memphis and Memphis and Ohio Roads, is no longer an open question.

By the Acts of 1851-2, Section 16, page 212, certain railroad companies (the Nashville and Memphis among them) were granted the right and given the authority to unite with each other, both as to their main stems and branches, and under this Act the Louisville and Nashville Railroad Company, operating the Memphis and Ohio or Nashville and Memphis Railroad, by consent of the city, could have constructed this or another line, connecting its

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line with the Mississippi and Tennessee Railroad or any other line.

Again, by the Act of 1860, the Memphis and Ohio Railroad was permitted to condemn lands from its depot on Main Street to its depot in the navy yard.

By the Act of 1879, page 18, the regulation of this matter was placed under the control of the taxing district. See also *Railroad v. Bingham*, 3 Pickle, 527; Dillon on Municipal Corporations, Secs. 558-60; 2 Woods Railway Law, 740.

For years the Memphis and Ohio Railroad Company operated a line with steam power to the navy yard west of the bayou, and the city authorities, before this contract was entered into, had recognized and provided for its use by leasing to the railroad depot grounds west of the bayou, which carried with it, by necessary implication, the right of access to the same by the steam cars used by the road. But under this contract, and by the bringing of this suit, the taxing district expressly sanctions the use of steam power over the line, and we are at a loss to see how defendant companies can complain.

We are also at a loss to see any other reason why the Louisville and Nashville Railroad Company, if a foreign corporation, can be excluded from the benefits of this contract. Its terms are broad enough to embrace all railroads, whether operating under domestic or foreign charters, provided they have a terminus in the taxing district.

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The Chancellor held that the question of the citizenship of the Louisville and Nashville Railroad Company could not be raised by defendants in this proceeding, and in this we think he was clearly correct.

The suit was brought before the passage of the Act of 1891, requiring foreign corporations to register their charters with the Secretary of State, and a memorandum of the same in counties where they propose to do business or wish to acquire property. Moreover, it does not appear that the Louisville and Nashville Railroad Company has not complied with that Act, if it be necessary, which we are not now called upon to decide.

Several exceptions were taken to the admission and rejection of testimony, and errors are assigned on this account. We find no reversible error in the action of the Court, and need not pass more definitely upon the exceptions made.

We are satisfied the decree of the Chancellor is correct, and affirm the same with costs, and the cause is remanded for further proceedings.

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RAILROAD *v.* GRIFFIN.

(Jackson. June 13, 1893.)

1. TELEGRAPH COMPANY. *Liability for negligent failure to send and deliver telegram.*

A telegraph company is liable in damages to the "sendee" for negligent failure to send and deliver telegram addressed by a mother to her son, informing him of his father's dying condition, and summoning the son to the father's bedside, although the mother paid the "toll" for sending the telegram, and the son, without receiving it, visited his father two days later, and reached him thirty-six hours before death.

Code construed: § 1542 (M. & V.); § 1323 (T. & S.).

Case cited and approved: Wadsworth *v.* Telegraph Co., 86 Tenn., 695.

2. SAME. *Same. Measure of damages.*

And damages should be awarded, in such case, in such sum as will reasonably compensate for the grief, disappointment, or other injury to the feelings of the "sendee," caused by the company's default, taking into consideration, in mitigation of damages, the fact that the son reached the father's bedside before his death.

3. NEW TRIAL. *Awarded for excessive verdict.*

The verdict of \$900 is so excessive upon the facts of this case as to demand a reversal for that cause alone.

FROM OBION.

Appeal from Circuit Court of Obion County.
W. H. SWIGGART, J.

MOORE & WELLS and HOLMES CUMMINS for Railroad.

Railroad *v.* Griffin.

L. S. PARKS and D. J. CALDWELL for Griffin.

BRIGHT, Sp. J. In this cause the plaintiff below, Robert Griffin, sues the railroad company, who owns and operates a telegraph line, for damages in failing to send or deliver a telegram from the mother of defendant in error, addressed to him at Rives' Station, Tennessee.

The second count of the declaration avers that Mrs. C. A. Griffin delivered to the railroad company's agent a telegram, addressed to defendant in error, which gave notice on its face that "his father was worse or in a dying condition, and to come and bring a lawyer." This averment was substantially proved. The sender paid the toll on said telegram, the sendee paying nothing. The telegram was delivered to the agent of the railroad company at Obion Station, Tennessee, late in the evening of the twenty-second of April, and received by said agent; but, from some cause, was never forwarded to its destination at Rives' Station. Upon the morning of the twenty-fourth of April, the defendant in error, without having received the telegram, visited his father, reaching his bed-side on the morning of the twenty-fourth, about nine o'clock. On the night of the twenty-fifth his father died.

There was a verdict and judgment of nine hundred dollars for plaintiff below.

The rule laid down in *Wadsworth v. Telegraph Company*, 2 Pickle, 695, is approved. We hold, under the reasoning of that case and the statute

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(M. & V. Code, § 1542), that defendant in error is an "aggrieved party," and is entitled to some damages; and, this being so, as said in the Wadsworth case, above cited, he may, in such case, recover, in addition, such "further sum as will reasonably compensate for the grief, disappointment, or other injury to her feelings, occasioned by such default of the company." It is true, in the Wadsworth case the sendee paid for the telegram, and did not reach her brother before his death, nor afterwards; while in the present case, Griffin, the sendee, did not pay the "toll" for the sending of the telegram, and did reach his father some thirty-six hours before his death. This latter fact would only go in mitigation or extenuation of, and should reduce the amount, of damages. Yet he had such an interest or benefit in said telegram as would give him a right of action for damages against the company for negligently failing to send the telegram.

The first assignment of error of the railroad company is that the verdict is excessive. This we think is well taken. As said by Chief Justice Turney in the Wadsworth case: "If juries may assess excessive damages, the Courts can and will correct the wrong."

We think the damage assessed by the jury in this case (\$900) is excessive, and, for this reason, we reverse the case, and remand it for another trial. The appellee, Griffin, will pay the costs of the appeal.

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(Jackson. June 19, 1893.)

1. ESTATE BY THE ENTIRETY. *Severed by divorce of the owners.*

An estate by the entirety is converted into an estate in common by a divorce of the owners.

Cases cited and approved : Ames *v.* Norman, 4 Sneed, 682 ; 80 Ill., 197.

2. SAME. *Seven years' adverse possession bars wife's rights.*

The wife's title is barred, if, after the severance of an estate by the entirety by a divorce of the owners, the entire interest in the lands is sold under decree for the husband's debt, and thereafter held adversely by the purchaser for the term of seven years.

Code construed : 22 3459-3461 (M. & V.); 22 2763-2765 (T. & S.).

FROM DYER.

Appeal from Chancery Court of Dyer County.
H. J. LIVINGSTON, Ch.

J. T. WOODSON and DRAPER & PARKS for Hopson.

RICHARDSON & HOOVER for Fowlkes.

McALISTER, J. This is an ejectment bill. Complainants seek to recover a tract of land, consisting

* The effect of a divorce on a tenancy by the entirety, as decided above, is in accordance with the doctrine declared in *Stelz v. Schreck* (N. Y.), 13 L. R. A., 325 and note.—REPORTER.

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of eight hundred acres, situated in Dyer County. Complainant Mary E. Hopson was formerly the wife of one James Wilson, to whom she was married in 1854, and during said marriage, to wit, on September 8, 1856, one William M. Shipp, the father of Mary E., conveyed to her and her then husband, James Wilson, jointly, the tract of land in controversy. The said James Wilson died in November, 1886, and complainants claim that the legal title to said land is vested in the said Mary E. by right of survivorship, the land having been owned by her and her then husband, James Wilson, by entireties. It should be stated, in this connection, the said Mary E. was divorced from the said James Wilson on the thirtieth of October, 1860, and on the eighteenth of March, 1861, she intermarried with W. H. Hopson, her present husband.

It further appears that, on January 4, 1860, the land in controversy was attached by creditors of the said James Wilson, and, under proper decrees of the Chancery Court of Dyer County, it was sold to the defendants, Fowlkes and Ledsinger. The defendants, therefore, claim title to said land as purchasers at that judicial sale under the decree of the Chancery Court vesting title in them, and by continuous adverse possession.

Respondents say they are, and all the time have been since the date of confirmation of sale, the owners in fee of said tract of land, holding and claiming the same openly against all persons. Re-

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spondents plead the statute of limitation of seven years, and they rely on said adverse claim, title, and possession of more than seven years as a complete defense to said action.

The Chancellor pronounced a decree in favor of defendants, and complainants have appealed.

It appears from the record that the defendant, H. L. Fowlkes, and P. C. Ledsinger, the ancestor of defendant Gilbert Ledsinger, purchased this land at the sale in the case of Ingram and Allen Walker against James Wilson, and that on the twenty-fourth of January, 1861, a decree was rendered confirming the sale, divesting title, and vesting the same in the purchasers.

It further appears that said purchasers went into immediate possession of the land, inclosed it with fences, erected improvements thereon, and have remained in continuous and adverse possession of the same up to the institution of the present suit, which was commenced on the twelfth of November, 1888—about twenty-six years after the defendants purchased and took possession of said land.

Under the operation of the first section of the Act of 1819, Ch. 28 (M. & V., § 3459), an adverse possession of seven years under a deed, grant, or other title purporting to convey the fee, not only bars the remedy of the party out of possession, but vests the purchaser with a good and indefeasible title in fee to the land described in his assurance of title. Under the second clause of the first section of said Act (M. & V., § 3460), it is

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-provided, viz.: "And, on the other hand, any person, and those claiming under him, neglecting for the said term of seven years to avail themselves of the benefit of any title, legal or equitable, by action at law or in equity effectually prosecuted against the person in possession, as in the foregoing section, are forever barred." The second section of said Act of 1819 (Code, M. & V., § 3461), provides, viz.: "No person, or any one claiming under him, shall have any action, either at law or in equity, for any lands, tenements, or hereditaments, but within seven years after the right of action has accrued." Under the proof in this case, the defendants are protected by each and all of the provisions of the statute, unless it appears that the complainant was laboring under some disability that exempted her from its operation.

It is insisted on behalf of complainant, Mary E., that the defendants, by virtue of their purchase, only acquired such interest as her former husband, James Wilson, had in this land, and that the said James Wilson, having died on the eighth of November, 1886, the said Mary E. then became entitled to the whole estate by right of survivorship.

It has already been mentioned that the said Mary E. was divorced from her former husband, the said James Wilson, on the thirtieth of October, 1860, but her counsel insist that this divorce did not change the nature of her estate in this

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land, which she still continued to hold by the entirety with the said James Wilson, with the contingent right to the whole estate in the event she survived him. It is insisted that her right of possession, and the devolution of the title did not accrue until the death of the said James Wilson, and that she is not affected by the lapse of time, and the statute of limitations.

It will be remembered that the decree of divorce was pronounced on the thirtieth of October, 1860, which was prior to the purchase by the defendants at the chancery sale, which occurred on the twenty-fourth of January, 1861.

What, then, was the effect of the divorce upon the tenure of complainant's title to this land?

In the case of *Harrer v. Wallner*, 80 Illinois, 197, the Supreme Court of Illinois had occasion to consider the question now before us. Judge Walker, in delivering the opinion of the Court, said: "Now, this estate by the entireties is peculiar. The possession of one is the possession of both. The estate is joint for life, and descends to or vests in the survivor absolutely, and in fee, and by the destruction of the estate of one it inures to the other. Neither can have partition, nor can either sell the estate so as to affect the rights of the other; and when their rights to the property are invaded, a suit for a recovery for the injury or for the property must be joint, because the property and the right to its enjoyment are joint during coverture." Then, appellee could not sue for

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and recover any interest in the land, without joining her husband in the action, until the coverture ceased. It is unlike tenants in common, where either may sue and recover for an injury to the property, and may use the names of his co-tenants.

What effect, then, did the granting of the divorce have on this estate, or the rights of the parties therein? The relation of husband and wife was thereby terminated, and with it all marital duties. Their interest and duties from thenceforth, as related to each other, were as though they never existed. The estate by the entireties is essentially a joint estate, although it differs in one or two particulars therefrom.

The power to hold jointly arose from the fact that they were married when the conveyance was made. Had the marriage not existed, the parties would have taken as tenants in common.

It was that circumstance, and that alone, which gave to them the joint life estate and the right to joint possession. When the very thing which, by operation of law, gave them a joint estate was destroyed, by operation of the same law the joint estate ceased, and they then became vested with an estate *per my* as tenants in common. They, by that act, and operation of law flowing from it, are not jointly entitled to possession, but, the unity of title and the unity of estate no longer existing with the incidental right of joint possession, it inevitably follows that they then became tenants in common. The termination

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of the marriage relation having wrought a change in the rights of the parties in the estate, the Courts should rather hold that the change is broad enough to convert it into an estate in common, than to hold that, whatever change was made, it left the right of survivorship.

But, on principle, we are satisfied the decree of divorce had the effect to make them tenants in common, and that appellee thereby becomes entitled to partition.

See also Bishop on Marriage and Divorce, Sec. 716; Freeman on Co-tenancy and Partition, Sec. 76.

We are not without authority on the question in this State.

In the case of *Ames v. Norman*, 4 Sneed, 682, it appeared that Ames and wife were seized of an estate in the land by entireties. Said land was sold at execution sale, in satisfaction of judgment against the husband, and the defendant, Norman, as a creditor of Ames, afterwards redeemed the land from the purchaser at said sale. After Norman's rights had become vested, the wife of Ames, the original judgment debtor, procured a divorce, and the question was whether the interest or title of the purchaser at execution sale was subject to be divested, or in any way affected, by a subsequent divorce *a vinculo matrimonii* to the wife. It was held that the subsequent divorce had no effect whatever upon the rights of such purchaser. It was held that the defendant, by his purchase, became invested with the right of the husband as

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it existed at the time of the sale—that is, a right to occupy and enjoy the profits of the land, as owner, during the joint lives of the husband and wife, subject to the contingency that if the complainant survives her former husband his estate will then terminate, but, if the husband survives, he will become absolute owner of the whole estate."

The case at bar is to be differentiated from the case of *Ames v. Norman* in this important particular, that in the present case it appears that the wife was divorced prior to the date of defendant's purchase and possession. At that date the wife's status was that of a *feme sole*, and her estate in this land had, by operation of law, been changed from one by the entirety to a tenancy in common. That Judge McKinney, who delivered the opinion of the Court in *Ames v. Norman*, recognized this distinction is apparent from the following language. We quote from his opinion, viz.:

"As one of the necessary results of the unity of person in husband and wife, it has always been held that where an estate is conveyed or devised to them jointly, they do not take in joint tenancy. Constituting one legal person, they cannot be vested with separate or separable interests. They are said, therefore, to take by entireties; that is, each of them is seized of the whole estate, and neither of a part. If the rights of husband and wife in relation to an estate held by entireties are not altered by the decree declaring

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the divorce, what becomes of the joint estate? What are their respective rights in the future in regard to it? They are no longer one legal person; the law itself has made them twain. They are no longer capable of holding by entireties; the relation upon which that tenancy depends has been destroyed. The one legal person has been resolved, by judgment of law, into two distinct individual persons, having in the future no relation to each other; and with this change of their relation must necessarily follow a corresponding change of the tenancy dependent upon the previous relation. As they cannot longer hold by a joint seizin, they must hold by *moieties*. The law, in destroying the unity of person between them, has, by necessary consequence, destroyed the unity of seizin in respect to their joint estate, for, independent of the matrimonial union, this tenancy cannot exist."

We think these principles are conclusive of this case. The decree of divorce, while it severed the unity of person of James and Mary E. Wilson, also severed their unity of estate in this land, making them tenants in common. That decree also removed the disability of Mary E. as a married woman, and left her free to institute proceedings for a partition of this land, or otherwise to assert her rights therein. She neglected to take any steps, and the bar of the statute was complete when the present suit was instituted. It may be remarked, in conclusion, that the whole ground-work of complainant's bill is based upon the as-

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sumption that complainant, Mary E., was not a party to the original attachment suit, and had no notice of those proceedings. This assumption is earnestly controverted by the defendants. We do not, however, decide that question, as it is wholly immaterial, the title of Mrs. Hopson having been extinguished and her remedy barred by operation of the statute.

The decree of the Chancellor is affirmed.

Chambers *v.* Chambers.

CHAMBERS *v.* CHAMBERS.

(Jackson. June 23, 1893.)

1. HOMESTEAD. *Widow's not assignable out of lands held by entireties.*

Land deeded to husband and wife during the existence of the marital relation vests absolutely in the widow on his death, and she cannot be compelled to take homestead therein.

Cases cited and approved: Jackson *v.* Shelton, 89 Tenn., 82; McRoberts *v.* Copeland, 85 Tenn., 211; Ames *v.* Norman, 4 Sneed, 683; Taul *v.* Campbell, 7 Yer., 319; Berrigan *v.* Fleming, 2 Lea, 275.

2. SAME. *Disallowed to widow for want of sufficient title in husband.*

The husband has no such interest in land as will, upon his death, support his widow's claim to homestead therein, when his father purchased and paid for the land, and ever afterwards received its rents and profits and paid taxes thereon, but, being financially embarrassed, took title in the name of the son, who executed bond, obligating himself to convey to the father, upon his repayment of a stipulated sum advanced by the son for the purchase of the land.

3. SAME. *Costs of proceedings.*

When the husband had apparent, but not real, title to lands, and his widow, believing his title perfect, has instituted proceedings for assignment of homestead out of same, but has failed by reason of the husband's want of title, the costs of such unsuccessful proceedings will be adjudged to be paid by the husband's administrator, and not by the widow personally.

4. SUPREME COURT PRACTICE. *Affirms correct decree.*

This Court will affirm a decree correct in result, though put, by the lower Court, upon erroneous grounds.

FROM CARROLL.

Appeal from Chancery Court of Carroll County.

A. G. HAWKINS, Ch.

Chambers v. Chambers.

Jo. R. HAWKINS for Complainant.

L. L. HAWKINS for Defendant.

WILKES, J. Henry Chambers died in October, 1888, leaving his widow, Tellulah, and one son surviving him. At the time of his death he and his wife owned a residence and furniture, situate in Huntingdon, Tenn., and conveyed to them during the existence of their marital life, by Joe McCracken.

The consideration agreed to be given by them for the house and lot and furniture was \$3,000, and of this amount \$1,500 was unpaid at his death, and was a lien upon the house and lot and furniture.

R. P. Chambers, the father of Henry, administered upon his estate. A controversy soon arose between the father, R. P. Chambers, as administrator, and Tellulah, the widow, as to the ownership of the furniture, and an agreed case was made up and submitted to the Court to determine this question. In this agreed case it was by the Court determined that, inasmuch as the furniture was conveyed to the husband and wife during their married life, it passed to the widow, and became her property, upon the death of the husband, and did not pass to his administrator.

After the death of her husband the widow sold the Huntingdon house and lot for \$2,250, and out of the proceeds paid off the incumbrance of \$1,500, and now claims the remainder by virtue of her

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survivorship of her deceased husband. Her husband, at the time of his death, was the apparent owner of certain other real estate, besides the Huntingdon house and lot, the title to which was vested in him alone, so far as appeared of record. The widow filed her petition in the County Court of Carroll County, asking to have homestead and dower assigned to her out of this real estate. That Court adjudged that she was entitled to homestead out of this real estate, and if the property exceeded \$1,000 in value, then to dower out of the excess over \$1,000, and appointed Commissioners to set the same apart.

These Commissioners assigned the entire property, exclusive of the Huntingdon lot, to the widow as her homestead, reciting in their report that it did not exceed \$1,000 in value.

Pending the confirmation of this report, complainant filed the present bill enjoining the confirmation, and all other proceedings to set apart homestead and dower out of said lands, upon two grounds:

First.—Upon the idea that the widow was entitled to homestead in the Huntingdon house and lot, and, having sold the same and realized therefrom, after paying the incumbrance, as much as \$1,000, she must take the same as her homestead, and was estopped to claim homestead in any other real estate belonging to her late husband.

Second.—That the real estate, beside the Huntingdon house and lot, which the Commissioners

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were about to set apart to her as homestead, was, in truth and fact, not the property of the husband when he died, but was the property of complainant, his father, and held in trust for him by the son.

It was claimed in the bill that the property was bought by the father, and paid for, in the main, by him, but that, by agreement between the father and son, the title was taken to the son, because the father was, at the time, involved, and could not hold property in his own name; and that it was further agreed that the title should so remain in the son until such time as it could be safely vested in the father; and, also, until certain indebtedness of the father to the son could be paid and satisfied, the son thus holding the title to the property to secure the amount due him, and to protect the same from other creditors.

It was further stated in the bill that the indebtedness of the father to the son amounted, in 1883, to \$1,858, and at that time the son executed to the father two bonds, conditioned to make title to the two pieces of property upon the payment of two certain sums, aggregating the indebtedness of \$1,858. These bonds for title were signed by the son, and witnessed, but were never recorded, and were not made public or known to the widow until after her husband's death, and until the filing of this bill. Upon their faces they purport to be ordinary bonds for title, reciting the sale of the property by the son to the father for

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a certain price, and providing that, on the payment of that price, the son would convey the lands to the father. They were not signed by the son's wife.

The widow, defending this bill, insists that the Huntingdon house and lot, conveyed by McCracken to her husband and herself during their married life, vested, upon his death, in herself absolutely as his survivor, and that the other real estate was the property of her husband when he died, and not of his father, and that she was entitled to homestead and dower out of the same, not having joined in the bonds for title.

Much proof was taken to sustain the contentions of the opposing parties. On the hearing, the Chancellor decreed that the widow was entitled to homestead in the Huntingdon house and lot, which she and her husband owned together at the time of his death; and reserved the question whether she was entitled to homestead in the other real estate until a reference could be executed by the Master to ascertain whether the widow had received, net, as much as one thousand dollars out of the sale of the Huntingdon property.

This reference being executed, it appeared that the net amount received by her from the sale of the Huntingdon property, after paying off the incumbrance, was as much as one thousand dollars, and perhaps more; and, thereupon, the Chancellor, in a final decree, held that the widow was not entitled to any homestead or dower in the other real estate.

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While the final decree does not so recite upon its face, it is evident, when it is considered in connection with the former decree and proceedings thereunder, that homestead in the real estate outside of the Huntingdon house and lot was denied because the widow had already received its net value out of the proceeds of sale of the Huntingdon property.

From the decree of the Chancellor the widow appealed, and she has assigned errors:

First.—That the Chancellor erred in holding that the widow's homestead right attached, upon the death of her husband, to the Huntingdon property, and that she was required to take her homestead out of it.

Second.—In not holding that she was entitled to homestead in the real estate other than the Huntingdon property.

Third.—In enjoining the proceeding to allot homestead and dower out of this real estate under the County Court proceeding.

Fourth.—In holding that, inasmuch as the widow had received as much as \$1,000 net out of the Huntingdon property, she could not have homestead out of any other property.

Fifth.—In taxing her with any costs incident to her attempt to obtain homestead and dower.

We are of opinion that the Chancellor erred in holding that the widow was entitled to or required to take homestead or dower out of the Huntingdon property. This property was deeded

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to the husband and wife during the existence of the marital relation. They held it by entireties during their joint lives, and upon the death of either the survivor took the entire and absolute estate. In this case, upon the death of the husband, the entire and absolute title to the land vested in the surviving widow, and she took the same under the rules of law in such cases.

The husband's estate and all his interest in said lot ceased with his life, and after his death he had no estate in the lands out of which the widow could be required, or was even entitled, to take dower or homestead. *Ames v. Norman*, 4 Sneed, 683; *Taul v. Campbell*, 7 Yer., 319; *Berrigan v. Fleming*, 2 Lea, 275.

It is true that the homestead right of the husband attaches to lands thus held during his lifetime; but this will not prevent the entire property (upon his death before the wife) passing to the widow by right of survivorship, and not as a homestead. *Jackson, Orr & Co. v. Shelton*, 5 Pickle, 82; *McRoberts v. Copeland*, 1 Pickle, 211.

We have examined the record carefully upon the question raised as to the true ownership of the real estate other than the Huntingdon house and lot, and we are satisfied from the proof that this real estate is the property of the father and not of the son. It appears that the father bought it and paid for it, using some property of the son and borrowing some money from him for that purpose; that he has been in continuous use and

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enjoyment of the property since its purchase, receiving its rents and profits, and paying taxes thereon; and we think the contention of the father in his bill as to this property is sustained by the proof. This being so, the widow of the son is not entitled to either homestead or dower out of the same.

The decree of the Chancellor refusing to allow homestead and dower out of this real estate is correct as to result reached; but based on the wrong ground, and we affirm the same in its results, and enjoin the proceeding to set apart to the widow homestead and dower out of this property by the County Court of Carroll County.

Inasmuch as the true state of the title to the real estate other than the Huntingdon property was withheld by complainants from the widow until the commencement of this litigation, she is relieved from all costs incident to her attempt, in the Court below and in the County Court and in this Court, to obtain homestead and dower out of said real estate, and the same will be paid by complainant out of the assets of the estate of Henry Chambers, which is being administered by him as insolvent.

Compton *v.* Perkins.

COMPTON *v.* PERKINS.

(Jackson. June 29, 1893.)

1. EXEMPT PROPERTY. *Widow's rights to.*

The widow becomes the absolute owner of the exempt personal property of the decedent, upon his death leaving no minor children of either, under § 3128 (M. & V.) Code, vesting such property in the "widow, for herself and in trust for the benefit of the children" of either.

Code construed: § 3128 (M. & V.); § 2288 (T. & S.).

Case cited and approved: Snead *v.* Jenkins, 90 Tenn., 137.

2. SAME. *Second husband takes in preference to decedent's adult children.*

And upon the death of such widow, after a second marriage, her surviving second husband takes such exempt property in preference to the adult children of her first husband.

Cases cited and approved: Williams *v.* Donnell, 2 Head, 695; 120 U. S. 534.

FROM CARROLL.

Appeal from Chancery Court of Carroll County.

A. G. HAWKINS, Ch.

J. P. WILSON for Compton.

JO. R. HAWKINS for Perkins.

SNODGRASS, J. Thomas S. Compton died in 1888 leaving a widow. He had been twice married, and

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several children of the first marriage survived him, all of them being of age. There were no children of the second marriage.

The exempt property was assigned to the widow, and she retained, used, and in part disposed of it during her life. She married again in 1890, and died in 1893. Her second husband was the defendant, W. W. Perkins. He retained such part of the exempt property as was on hand at the death of his wife, claiming it *jure mariti*.

The complainants brought the bill in this cause to replevy the property, and have their right to it determined as children of the original owner, Thomas S. Compton. They averred substantially the facts stated, and insisted that upon the death of their step-mother (with whom it was not averred that they had ever at any time resided) they were entitled to the property.

The defendant demurred, on the ground that the bill showed no right in complainants, but, on the contrary, that defendant was entitled to the property.

The Chancellor overruled the demurrer, and allowed defendant to appeal, which he did, and assigned error to the same purport as the demurrer.

The decree is erroneous. Exempt personal property, on the death of the head of a family, who leaves a wife and children surviving, goes to the widow, for herself, and in trust for the benefit of the children of the *deceased*, or of the *widow*, or of *both*. Code (M. & V.), § 3128.

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The "children" here designated are not necessarily the heirs or distributees of either the husband or wife, for they may be either his children alone or hers alone, or those of both. The statute, therefore, is not intended to pass such property to heirs or distributees, in the ordinary sense or in the ordinary way. It designates a class or classes of persons as the objects of its beneficial operation in connection with the widow. Neither is the term "children" used in the more enlarged sense of sons and daughters of either, for it was not intended to provide for the grown and married descendants of husband or wife out of the exempt property of the husband thus vested in the wife "for herself and in trust for the benefit of the children," etc. The word "children" was used in the ordinary sense in which it is understood—as the young sons and daughters of husband or wife, who might constitute properly a part of the family of which the deceased was the head—children in fact, in contradistinction to any descendant who was no longer a child.

This is clearly indicated by the further provision that where there is no widow the property is to be exempt for the benefit of the minor children under fifteen.

In this instance we have the case of a widow surviving, but no children of either of the classes entitled to share with her in the beneficial use and enjoyment of the exempt property. By the plain terms of the statute, she was therefore entitled to

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the property absolutely. It is "vested in the widow for herself and for the benefit" of others. If there be no others, the entire beneficial interest is in her.

The exempt property is to serve a special purpose of benefit to the family of a deceased, or that of which he was the head. The widow takes it as a trust for this special use—her own and that of those thus declared entitled to share it with her as a family. If one die, an interest is not distributed. It remains an entirety for use of survivors. *Sneed v. Jenkins*, 6 Pickle, 137.

If there be no family but the widow surviving, she is the sole object of the provision of the statute—the sole beneficiary for whom she holds, and, therefore, the absolute owner.

The decree is erroneous. It is reversed, and the bill dismissed with cost.

McNeill *v.* State.

McNEILL *v.* STATE.

(*Jackson.* June 30, 1893.)

CRIMINAL LAW. *Keeping liquor saloon open on Sunday.*

A druggist who sells liquors by the drink and in quantities, in the same room where his drugs are kept, having a tippler's or retail liquor dealer's license for that purpose, must close his house on Sunday, under Act of 1889, Chapter 31, prohibiting, among other things, the keeping open on Sunday of any place where intoxicating liquors are sold, with a proviso that it shall not apply to a druggist selling on the prescription of a practicing physician.

Act construed: Acts 1889, ch. 31.

FROM HENRY.

Appeal in error from the Circuit Court of Henry County. W. H. SWIGGART, J.

SWEENEY & WARD and LAMB & FARABOUGH for McNeill.

M. B. GILMORE and Attorney-general PICKLE for State.

A. D. BRIGHT, Sp. J. T. C. McNeill was presented for keeping open on Sunday his business house, a place wherein he followed the business of dealing in and selling liquors. He was convicted and sentenced by the Court to pay a fine of one

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dollar and the costs of the case, and has appealed to this Court.

The facts are, briefly, as follows: The plaintiff in error, McNeill, was a druggist in Paris, Tennessee. In addition to his drugs, he keeps all sorts of liquors for sale, and sells same by the drink or quantity, and upon the prescription of physicians, and without such prescriptions. He has retail liquor dealer's license, and does retail and tipple all sorts of liquors. His drugs and liquors are all in the same house and room, and there is nothing that separates the one from the other. The entrance to one is the entrance to both. He kept this house open on Sunday, but sold no liquors—only sold drugs, etc.

The presentment is found under the Act of 1889, Chapter 31, which is as follows:

"Be it enacted by the General Assembly of the State of Tennessee, That the law of this State prohibiting the sale of liquors on Sunday, as compiled in § 5611 of Milliken & Vertrees' compilation, be so amended as to prohibit the sale, on Sunday, of any malt, vinous, fermented, or other intoxicating liquors, or to keep open on Sunday any place where such liquors were sold or dispensed. And any person offending shall be punished as provided in said Acts; Provided, That the provisions of this Act shall not apply to druggists selling on the prescription of a practicing physician; Provided further, That restaurants and eating-houses, where spirituous, vinous, and malt liquors are sold under

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the license law of the state on week days, shall be allowed to conduct their eating department on Sunday; but the bar-room shall be closed, and no drinks of any kind sold."

The facts of this case show that McNeill has a saloon in the same room where his drugs are kept, and that he sells his liquors, wines, etc., by the drink and in quantities, and that he has the tippler's or retail liquor dealer's license for this purpose, and that he does not sell his liquors, etc., alone on the prescription of a practicing physician, but sells with or without said prescription.

It is true, that, under the law, the Act of 1889, Chapter 31, under which the presentment in this case is found, an exception is made in favor of druggists who sell liquors on the prescription of physicians, and if the defendant, McNeill, kept liquors only to sell on prescription, or as a medicine, or to compound medicines with, he would not be required to close his house on Sunday. But this exception does not extend to a druggist who tippling whisky and liquors, etc., generally, to any one who applies to buy it without any prescription; and, if he does so, he must close his house on Sunday. It is manifest that the Legislature intended to keep liquor houses closed on Sunday, and did not intend that any person should have the privilege of keeping one open merely by taking out a druggist or other license. Otherwise, all saloons could be kept open by merely securing such license, and thus the very object which the

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statute was intended to promote, be not only defeated, but the statute made to subserve an exactly opposite purpose than that for which it was enacted. This is made all the more obvious, when we look to the provision made for restaurant and eating-house keepers at a place in which liquors are sold, upon condition that, and only upon condition that, the bar-room in which the liquors were sold shall be closed.

It was not intended to interfere with the druggist's right to keep his drug store open and sell drugs any more than upon their's, if, he kept in connection with it, as they are required to do, a bar-room which could be closed, and his other business done, as their's must be done, without keeping a bar-room open. But if he undertook, as in this case, to make a drug-room and bar-room one, so that the drug-room could not be kept open without keeping the bar-room open, he could keep neither open upon Sunday, under the plain terms of the statute, because, in keeping, or professing to keep, one open, he, in fact, kept both open.

The druggist who does not tipple or sell without prescription, is not affected by the Act; and he who attempts to do so could only do it by so separating his bar-room from his drug-room that the first may be closed on Sunday if the latter remains open.

Affirm the judgment.

Bank *v.* Bowdre Bros.

*BANK *v.* BOWDRE BROS.

(Jackson. August 7, 1893.)

1. LIBEL.

The defendant in an action of libel or slander cannot, under the general issue, prove the truth of the defamatory matter, either for the purpose of defeating the action or in mitigation of damages. (*Post*, pp. 730, 731.)

Cases cited and approved: McCampbell *v.* Thornburg, 3 Head, 109; Shirley *v.* Keathy, 4 Cold., 29; West *v.* Walker, 2 Swan, 32; Hackett *v.* Brown, 2 Heis., 264.

2. GENERAL ISSUE.

The plea of the general issue in an action of oral or written slander operates as a denial of the speaking of the words or the publication of the libel, and a denial also of the damages in cases where the averment of special damages is necessary to maintain the action. But the plea of the general issue admits that the words were not true. (*Post*, p. 731.)

3. JUSTIFICATION.

The truth of the words charged to have been spoken or published is a conclusive defense to the action, but, in order to be available, must be relied on by a formal plea of justification. (*Post*, p. 731.)

4. INNUENDO.

Defendant may plead a justification, and, in the same plea, deny that the words are susceptible of the meaning ascribed to them in the innuendo laid in the declaration. (*Post*, pp. 731, 732.)

5. DAMAGES.

If the words are actionable *per se*, the plaintiff may recover damages without the necessity of showing by evidence that he has sustained any pecuniary loss, for in such case the law presumes damages. If, on the other hand, the words are not actionable in themselves, the plaintiff must not only show the publication of the words, but that it has resulted in special damages to him. (*Post*, pp. 734, 735.)

6. LIBEL PER SE.

Defamatory words falsely spoken or written of a party, which preju-

*Syllabus prepared by Judge McAlister.—REPORTER.

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dice such person in his profession or trade or business, are actionable in themselves, without proof of special damages. (*Post*, p. 736.)

7. SAME.

Words which impute a want of credit or responsibility, or suggest a charge of insolvency, spoken of merchants, tradesmen, and others in occupations where credit is essential to successful prosecution, are actionable without proof of special damages. (*Post*, p. 737.)

8. EVIDENCE.

If the words spoken or written, though plain in themselves, apply equally well to more persons than one, evidence may be given, both of the cause and occasion of the publication and of all the surrounding circumstances affecting the relation between the parties, or of any statement or declaration made by the defendant as to the person referred to. (*Post*, pp. 738, 739.)

9. PROVINCE OF COURT AND JURY.

Where the language published is unambiguous, it is the exclusive province of the Court to determine its construction and adjudge whether or not, upon its face, it is actionable *per se*. But on a plea of not guilty, whether the defamatory matter was published concerning any particular individual or firm, is a question of fact for the jury. (*Post*, p. 740.)

Case cited and approved: *Banner Co. v. State*, 16 Lea, 179.

10. LIBEL PER SE.

The words, "Bowdre in the hands of a Notary," found by the jury to have been written and published concerning the plaintiffs, a mercantile firm, were libelous and actionable *per se*. (*Post*, pp. 738, 739.)

11. DAMAGES.

Where damages assessed by a jury are so excessive and extravagant as to indicate passion and prejudice, this Court will award a new trial. (*Post*, p. 742.)

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

Bank *v.* Bowdre Bros.

MORGAN & McFARLAND and ESTES & FENTRESS
for Bank.

M. B. TREZEVANT, METCALF & WALKER, and
TURLEY & WRIGHT for Bowdre Bros. & Co.

McALISTER, J. This is an action of libel brought by the firm of Bowdre Bros. & Co. in the Circuit Court of Shelby County against the Continental National Bank of Memphis and C. F. M. Niles, its cashier. It appears from the record that on October 16, 1890, Messrs. R. L. Bliss & Co., of Florence, Alabama, drew a sight-draft on Bowdre Bros. for the sum of six hundred and fifty-nine dollars and ninety-five cents. This draft was sent for collection through the First National Bank of Florence, Alabama, to the Continental National Bank at Memphis.

It appears that R. L. Bliss & Co. were customers of Bowdre Bros. & Co., and shipped them large consignments of cotton. At the time this draft was drawn, Bowdre Bros. & Co. had funds in their hands belonging to Bliss & Co., and it was their duty to pay the draft. The Continental National Bank, on the morning of October 16, by its collector, presented the draft at the office of Bowdre Bros. & Co. It appears that neither member of the firm was in the office when the draft was presented. The book-keeper of the firm requested that the draft might be left for a short time, but this request was declined, in accordance with the established usage of this bank.

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About three o'clock of the same day, the bank asked Bowdre Bros. & Co., over the telephone, what they intended to do about the draft. W. T. Bowdre replied that the money was in his office to meet the draft, and he would pay it when presented. The bank then turned the draft over to a Notary, who presented it at the office of Bowdre Bros. & Co., and received payment in full, returning with the money to the bank. It further appears that, soon after the draft was handed the Notary by the bank for collection, and after Bowdre Bros. & Co. had notified the bank, over the telephone, of their readiness to pay the draft on presentation, the corresponding clerk of the Continental National Bank addressed a postal-card to the First National Bank, of Florence, Ala., stating that "Bowdre was in the hands of a Notary." This postal-card, it reasonably appears from the record, was not mailed until six o'clock that evening. In the meantime, and about five o'clock, the money had been paid into the bank by the Notary. It thus appears that Bowdre Bros. & Co. were not protested for the non-payment of this draft, nor was said firm in the hands of a Notary for protest, but, on the contrary, it must have been understood that the draft would be paid on presentation. The evidence is indisputable that, at the time the postal-card was mailed, stating that Bowdre was in the hands of a Notary, the draft had been paid, and its proceeds were in the vaults of the Continental National Bank.

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There was proof on the trial below tending to show that a report became prevalent among the merchants of Memphis, having its origin in the publication of the postal-card, that the Continental National Bank had protested the Bowdres, and that said firm had become involved. There was also proof tending to show that the commercial agencies subjected the Bowdres to an investigation. It is shown, also, that the rumor reached the customers of Bowdre Bros., and, in one instance, caused a withdrawal of large deposits. The trial resulted in a verdict and judgment against the bank for the sum of twenty thousand dollars, but in favor of C. F. M. Niles, cashier. Motions for a new trial and in arrest of judgment having been overruled, the bank appealed, and has assigned errors.

The first assignment of error arises upon the charge of the Court with respect to the pleadings. The declaration avers that "plaintiffs are merchants and traders in the city of Memphis, and in the exercise of that calling on the sixteenth of October, 1890, in which calling a good financial credit and standing is, and was, on said day, and at all times, of great importance and value to them, and that, on said sixteenth of October, 1890, the defendants, wickedly intending to injure the plaintiffs, did maliciously compose and publish of, and concerning the plaintiffs, a certain false, scandalous, and defamatory libel; that is to say, it, through its officers, wrote and directed a certain United States

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postal-card, on said October 16, 1890, and addressed the same to the First National Bank at Florence, in the State of Alabama, and deposited the same in the United States post-office at Memphis, Tenn., with legal postage prepaid, as follows:

“CONTINENTAL BANK, MEMPHIS, TENN.,

“October, 16, 1890.

“Yours of —— received ——. We credit ——. Bowdre in hands of Notary ——. Entered for collection.

Respectfully,

“C. F. M. NILES, *Cashier.*”

“Meaning thereby that the plaintiffs had suffered their financial credit and standing as merchants to become dishonored by a protest for non-payment of their commercial paper at the hands of a Notary, which said postal-card was carried through the United States mail, and, by due course, was received by said First National Bank of Florence, and, by it, was publicly shown and exhibited to divers persons then and there, by means whereof the plaintiffs have been brought into public scandal and commercial disgrace, and greatly injured in their good name and otherwise injured, to their damage fifty thousand dollars,” etc.

To this declaration the defendants pleaded the general issue. In this state of the pleadings the Circuit Judge opened his charge to the jury, viz.:

“The defendants, the Continental Bank and C. F. M. Niles, had the right to make any legitimate pleading that would defeat this suit. They did

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plead not guilty. They could have pleaded further if they has so desired, viz.:

“*First.*—Justification generally; that is, that the language written on the postal-card, and the meaning or innuendo as set out in the declaration, was true.

“*Second.*—They might have pleaded specially; that is, that the language written on the postal-card was true, and would have been compelled to prove it; and they might also have pleaded that the innuendo or meaning attributed to the language written on the postal-card, as set out in the declaration, was not a legitimate construction of such language. If either of the foregoing pleas had been interposed and established, it would have defeated this action.

“*Third.*—Defendants might have pleaded the general issue, and under it insist that the communication, in the language written on the postal-card, was one which, in law, he had a right to make, and therefore it was privileged, or that he or it was protected in making it.”

The first assignment of error is that the Circuit Judge erred in charging the jury as follows:

“If the last method of pleading—viz., the general issue—is adopted, defendant thereby admits that the language used on the postal-card is *not true*. In this case the Court has to tell you that the course of pleading, as set out in the third item—viz., the plea of the general issue—is the one adopted by these defendants, and under it they

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admit that the language used in the postal-card is *not true.*"

It is insisted that this charge is erroneous. It is admitted by counsel that in actions for libelous publications imputing crime or moral turpitude, and perhaps in cases clearly imputing commercial insolvency, the truth of the publication cannot be given in evidence under the general issue. But counsel insist that this is an action for libel only in respect to special damages to commercial credit, and that the rule invoked by the Court has no application.

In the investigation of this question we will first inquire what is admitted as a matter of pleading under the general issue in an action of libel, and whether there is any difference in the application of the rule when the libelous matter is actionable *per se*, and when it is only actionable upon averment and proof of special damages. The general principle that the defendant in an action of libel or slander cannot, under the general issue, prove the truth of the defamatory matter is well settled in this State. *McCampbell v. Thornburg*, 3 Head, 109; *Shirley v. Keathy*, 4 Cold., 29; *West v. Walker*, 2 Swan, 32; *Hackett v. Brown*, 2 Heis., 264.

In *Hackett v. Brown* this Court quotes with approval the following language from Section 324, 1 Greenleaf on Evidence, viz.: "It is perfectly well settled that, under the general issue, the defendant cannot be admitted to prove the truth of the words, either in bar of the action or in miti-

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gation of damages." The plea of the general issue on an action of oral or written slander operates as a denial of the speaking of the words or the publication of the libel, and a denial also of the damages in cases where the averment of special damages is necessary to maintain the action. Where the defense is that the libel or words were published or spoken, not in the malicious sense imputed by the declaration, but in an innocent sense, or upon an occasion which warranted the publication, this matter may be given in evidence under the general issue. Newell on Defamation, Slander, and Libel, page 648. But it is well settled that, under the plea of the general issue, the defendant cannot be permitted to give in evidence any matters tending to establish the truth of the defamatory matter, either in bar of the action or in mitigation of damages. The truth of the words charged to have been spoken or published is conclusive defense to the action, but, in order to be available, must be relied on by a formal plea of justification. It is insisted, however, on behalf of the bank, that it was precluded from interposing a plea of justification as a defense, for the reason that plaintiff employed an innuendo in the declaration, which ascribed an unwarranted meaning to the words written on the postal, and that defendant could not justify the use of the words without at the same time justifying the meaning set forth in the innuendo.

"The defendant," says Mr. Newell, page 628, "is

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in no way embarrassed by the presence of the innuendo in the statement of the claim; in fact, it is to him an advantage. He can either deny that he spoke the words, or he can admit that he spoke them, but deny that they conveyed that meaning. He can also plead that the words were true, either with or without the alleged meaning. It will then be a question for the jury to say from the proofs whether the plaintiff's innuendo is sustained. If not, the plaintiff may fall back upon the words themselves; and urge that, taken in their natural and obvious signification, they are actionable in themselves, without the alleged meaning, and that therefore his unproved innuendo may be rejected as surplusage. The plaintiff, however, will not be allowed, in the midst of the trial, to start a fresh innuendo not in the pleadings. He must abide by the construction put on the words in his statement, or else rely on their natural and obvious import."

It is true Mr. Townsend, in his work on Slander and Libel, states that a justification on the ground of truth must justify in the sense imputed by the innuendo, for the reason that the plea admits the innuendo. Sec. 215. But it is evident the author refers here to a plea that justifies the libel or slander *generally*, and he does not mean to say that there can be no *special* justification under the American practice. It would violate every canon of common sense and good pleading to hold that a defendant cannot justify the speak-

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ing of the words or the publication of the libel without at the same time admitting the truth of some far-fetched and extravagant meaning started in the imagination of the pleader or evolved from the morbid brain of his client, and introduced into the declaration in the form of an innuendo.

It was perfectly admissible, we think, under the authorities, for the defendant bank to have pleaded a justification of the words written on the postal, and, in the same plea, to have denied that the words were susceptible of the meaning ascribed to them in the innuendo, and we fail to perceive in what way the defendant was embarrassed or hampered, or precluded from the interposition of the plea of justification by the presence of the innuendo.

Again, it is contended by counsel for the bank that while it may be true that in an action for libelous publications imputing crime or moral turpitude, and perhaps in cases clearly *per se* imputing commercial insolvency, the truth of the publication cannot be given in evidence under the general issue, yet this principle does not apply in cases where the language is only actionable upon averment and proof of special damages. In the opinion of the Court, this position is untenable. A plea of justification, supported by proof of the truth of the charge, is a conclusive defense, whether the words are libelous *per se* or are only actionable upon proof of special damages. The true distinction between the two classes of cases

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is not to be found in the contention of counsel for the bank that when the words are actionable *per se* the justification of their truth must be specially pleaded, while in cases which are only actionable upon averment and proof of special damages the truth of the words may be shown under the plea of not guilty; but the marked feature that distinguishes the two classes of cases is to be found in the *quantum* of evidence to be introduced by the plaintiff on the question of damages. If the words are libelous *per se*, the plaintiff may recover damages without the necessity of showing by evidence that he has sustained any pecuniary loss. If, on the other hand, the words are not actionable in themselves, the plaintiff must not only show the publication of the words, but that it has resulted in special damages to him. In the former, the plea of not guilty does not put in issue the question of damages, because damages are presumed; while in the latter no damages are recoverable unless averred and proved. As already stated, this is the distinguishing feature of the two classes of cases, and we apprehend that if the defendant wishes to avail himself of the defense that the words are true, a formal plea of justification is as necessary in the one case as in the other, and in neither case can the truth of the words be proved under the general issue.

In the case of *Sheehan et al. v. Collins*, 20 Illinois, 325, which was an action for libel, it was

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urged that the Court below erred in instructing the jury that the defendant, by pleading the general issue, admitted that plaintiff was innocent of the charge. The Supreme Court said: "While this is not the language of the plea, it is undoubtedly the effect of such a plea, citing *Reginer v. Cabot*, 2 Gilm. R., 39. That plea denies the act charged in the declaration only, and the truth or falsehood of the charge cannot be inquired into under that issue." Its falsehood stands admitted by the parties. See also Townsend on Slander and Libel, Section 403, where it is stated that the plea of the general issue admits the falsity of the charge.

While we are of opinion the charge of the Circuit Judge, laying down the rule on this subject, was technically correct, we think it is objectionable, and, ordinarily, would have been misleading, in that it omitted to state, in the same connection, that the failure to plead a justification was not an admission of the writing and publication of the words, but that the plea of the general issue was a denial both of the writing and publication. We can see, however, from the record that this omission could not have been prejudicial to the defendant, since the writing and publication were not disputed on the trial.

We next proceed to inquire whether the words laid in the declaration are libelous *per se*, or are actionable only upon averment and proof of special damages.

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Mr. Newell, in his work on Defamation, Slander and Libel, page 181, says, viz.:

"When language is used concerning a person or his affairs, which, from its nature, necessarily must, or presumably will, as its natural and proximate consequence, occasion him pecuniary loss, its publication *prima facie* constitutes a cause of action, and *prima facie* constitutes a wrong, without any allegation or evidence of damage other than that which is implied or presumed from the fact of publication, and this is all that is meant by the terms actionable *per se*. Therefore, the real practical test by which to determine whether special damage must be alleged and proven in order to make out a cause of action for defamation, is whether the language is such as necessarily must, or naturally and presumably will, occasion pecuniary damage to the person of whom it is spoken."

Defamatory words, falsely spoken of a party, which prejudice such party in his profession or trade or business, are actionable in themselves, without proof of special damages.

Of merchants, tradesmen, and others in occupations where credit is essential to successful prosecution, any language is actionable, without proof of special damages, which imputes a want of credit or responsibility, or suggests a charge of insolvency. Newell, Secs. 168-193; Townsend on Libel and Slander, Sec. 191.

Next to imputations which tend to deprive a man of his life or liberty, or to exclude him from

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the comforts of society, may be ranked those which affect him in his office, profession, or means of livelihood. Newell on Defamation, Slander and Libel; Sec. 168. "It by no means follows," says the same author, "that all words spoken to the disparagement of an officer, professional man, or trader, will be actionable in themselves. Words, to be actionable on this ground, must touch the party in his office, profession, or trade; that is, they must be shown to have been spoken of him in relation thereto, and to be such as would prejudice him therein." Newell, page 174.

Says Mr. Townsend: "That the language must touch the person whom it concerns in his special character, means only that it must concern him in such special character, and affect him therein." Sec. 190.

The rule is thus stated by Judge Andrews in *Sanderson v. Caldwell*, 45 New York, 405 (S. C., 6 Am. Reports), viz.: "There is some confusion in the cases upon the point whether the words used must in terms be applied by the speaker to the office, business, or profession of the person who claims to recover by reason of them, and whether, if not so expressly applied, they can be said to touch him in the special character named. The rule derived from the authorities, and with which most of the cases can be reconciled, seems to be this: When the words spoken have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him in re-

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spect to it, or to impair confidence in his character or ability, when, from the nature of the business, great confidence must necessarily be reposed, they are actionable, although not applied by the speaker to the profession or occupation of the plaintiff; but when they convey only a general imputation upon his character equally injurious to any one of whom they might be spoken, they are not actionable, unless such application be made." Tested by these principles, is the language of the postal-card, "Bowdre in the hands of a Notary," libelous *per se*—that is, actionable without averment and proof of special damages?

The argument against such a construction is, that the words used on the postal do not, in their obvious meaning, convey to the mind an imputation of a protest of Bowdre Bros. & Co.'s commercial paper; that the name of the mercantile firm of Bowdre Bros. & Co. is not mentioned, and that the words, "in the hands of a Notary," do not obviously impute a protest or insolvency, but mean a demand for payment, and a protest if payment is refused. The position assumed by counsel for plaintiff in error is that the words are ambiguous in their meaning, and do not in their obvious sense necessarily impute a protest, and are also ambiguous in their application, and are not libelous on the plaintiff's *per se* without extraneous facts, explanation, or innuendo. We do not think the character of the libel is changed by the fact that an innuendo showing the meaning and application

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of the words, is employed in the declaration. The full name of the party need not appear in the libel. All that is necessary is that the words must refer to some ascertained or ascertainable person, and that person must be the plaintiff. Newell, page 256-7. "Whether a man is called by one name or whether he is called by another, * * * if those who look on know well who is aimed at, the very same injury is inflicted, the very same thing is, in fact, done as would be done if his name and Christian name were ten times repeated." Odgers, on Libel and Slander, 130.

If the words spoken or written, though plain in themselves, apply equally well to more persons than one, evidence may be given both of the cause and occasion of publication, and of all the surrounding circumstances affecting the relation between the parties, or of any statement or declaration made by the defendant as to the person referred to. Newell, Section 259.

"Nor is the character of the libel affected by the fact that its full meaning is set forth in an innuendo. The office of the innuendo is to aver the meaning of the language published. Therefore, if the meaning of the language is plain, no innuendo is needed. The use of it can never change the import of the words, nor add to nor enlarge their sense. If the common understanding of men takes hold of the published words, and at once applies without difficulty or doubt a libelous meaning thereto, an innuendo is not needed, and would

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be but useless surplusage in pleading." Newell, Section 619.

Again, it is a familiar rule that words are to be understood in their ordinary signification unless reason appears for assigning a different sense. Says Mr. Newell: "The Courts no longer strain to find an innocent meaning for words *prima facie* defamatory, neither will they place a forced construction on words which may fairly be deemed harmless. The rule which once prevailed, that words are to be understood in *mitiori sensu*, has been long ago superseded, and words are now to be construed by Courts as they always should have been—in the plain and popular sense in which the rest of the world naturally understood them. In all cases of ambiguity it is purely a question for the jury to decide what meaning the words would convey to persons of ordinary intelligence."

Newell, page 304; *Watson v. Nichols*, 6 Hum., 174.

Where the language published is unambiguous, it is the exclusive province of the Court to determine its construction, and to determine whether or not upon its face it is actionable *per se*, etc. *Townsend on Libel and Slander*, Section 286; *Banner Publishing Co. v. State*, 16 Lea, 179. But on a plea of not guilty, whether the defamatory matter was published concerning any particular individual, or whether that individual was intended, is a question of fact for the jury. *Id.*

This Court is of opinion that the words, "Bowdre in the hands of a Notary," found by the jury

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to have been written of and concerning the mercantile firm of Bowdre Bros. & Co., were libelous *per se*. We think these words would be universally understood by merchants and business men to mean that some commercial paper for which Bowdre Bros. & Co. were primarily bound had not been paid during business hours, and had gone into the hands of a Notary for protest. The obvious meaning of the words is that Bowdre's own paper was in the hands of a Notary—not that paper drawn on him had been placed in the hands of a Notary. It is admitted that the non-payment of an unaccepted draft by the drawees, and a protest for such non-payment, does not dishonor the drawee; but the objectionable words used in this postal contains no such explanation. The language employed convey the idea that there had been a failure on the part of Bowdre Bros. & Co. to meet, within business hours, some mercantile paper for which they were primarily bound, and that it had become necessary to place the same in the hands of a Notary for protest. Such language contains a clear imputation that touched the credit, standing, and solvency of a mercantile firm, and the language is actionable *per se*. "To say or publish of a merchant any thing that imputes insolvency, inability to pay his debts, want of integrity in his business, or personal incapacity or pecuniary inability to conduct it with success, is slanderous or libelous *per se*, if without justification, and general damages may be recovered." 57 Md. Rep., 38.

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The nineteenth assignment of error is that the Circuit Court erred in not granting a new trial on the ground that the verdict is excessive. This Court is satisfied, upon a careful examination of the record, that this assignment should be sustained. We are of opinion, in view of the facts disclosed by this record, that the damages assessed (twenty thousand dollars) are so excessive and extravagant as to indicate passion and prejudice on the part of the jury.

As the case must be retried, we refrain from reviewing the case further than to say that we find many facts and circumstances in proof which, in our opinion, should have mitigated the damages assessed by the jury.

Reversed.

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* DUNN v. EATON.

(Jackson. September 11, 1893.)

1. EJECTMENT. *Evidence.*

The self-disserving admissions of a predecessor in title are, as a rule, admissible against those who follow and claim under him, when such admissions are made at the time such predecessor was in possession. (*Post, p. 750.*)

2. SAME. *Same.*

Declarations of this character are to be received, not only in disparagement and diminution of the property which the declarant enjoyed, but as evidence of any fact which is not foreign to the statement against interest, and which forms substantially a part of it. (*Post, p. 750.*)

3. SAME. *Same.*

The rule admits, as against succeeding holders of a title, maps, recitals in deeds, monuments, and boundaries, of which an owner, during his ownership, was author. (*Post, p. 750.*)

4. SAME. *Same.*

Deeds, although not links in derangement of title from original owner, are admissible in evidence, when connected with possession of present owners, and of those under whom they claim, for the purpose of showing the boundaries of such possession, as well as the nature, extent, and description of their claim. Such conveyances are also admissible in aid of the presumption of a deed from one of the original grantors, arising from long possession of defendants and of those under whom they claim. (*Post, p. 751.*)

5. SAME. *Presumption of deed.*

When possession and use of land are long continued, they create a presumption of lawful origin—that is, that they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the property. It is sufficient, if the evidence leads to the conclusion that the conveyance might have been exe-

* Syllabus prepared by Judge McAlister.—REPORTER.

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cuted, and that its existence would be a solution of the difficulties arising from its non-execution. (*Post*, pp. 753, 754.)

Cases cited and approved: Williams *v.* Donnell, 2 Head, 695; 120 U. S., 534.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
W. D. BEARD, Ch.

M. R. PATTERSON, and RANDOLPH & SONS for Dunn.

L. B. EATON, F. P. POSTON, GANTT & PATTERSON, GEO. WEIRHARDT, W. B. GLISSON, METCALF & WALKER, and SMITH & COLLIER for Eaton.

McALISTER, J. This is an ejectment bill to recover an undivided one-third interest in six acres of land lying along the south side of Vance Street, in the city of Memphis. The land in controversy is part of a tract of two hundred and forty-three acres originally owned by Dr. Dudley Dunn. By a codicil to his will, dated January 3, 1847, Dr. Dunn devised all the residue of his estate, embracing this two hundred and forty-three acre tract, to his three children, Camilla F. DuBose, William D. Dunn, and David L. Dunn, to have and to hold the same during their natural lives, and from and after their deaths he devised the share of each to

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such child or children as each may have living at his or her death.

Dr. Dunn, the testator, died in February 1848, and on March 18, 1848, his devisees filed their petition in the Commercial and Criminal Court of Memphis for a partition of this land as life tenants under the will. The Commissioners appointed by the Court made a report of a partition dated April 26, 1848, which was confirmed by the Court, and title vested and divested. The property in controversy was not embraced in the report of the Commissioners, and was entirely excluded from the partition.

The complainants in the present suit are the children of William Dudley Dunn, who, as already stated, was a son of Dr. Dunn, and these children claim an undivided one-third interest in this six acres as remainder-men devisees under the will.

William Dudley Dunn died in May, 1881, and this bill was filed on March 14, 1888, within seven years after his death. The contention of complainants is that their father had a life estate in this land, and that, upon his death, in May, 1881, their rights accrued as remainder-men, under the will of Dr. Dunn, and that they then answered the description in his will of children of William Dudley Dunn living at the time of his death. Defendants are the persons in possession of different parts of the six acres, and those claiming title to different portions of it. Defendants claim under connected conveyances from Judge William T.

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Brown, who conveyed to Walker in 1855, and describes the land as lot number five of a town laid off by Dr. Dunn.

Defendants have all answered, but none of them set up any conveyance from Dr. Dunn, nor any contract in writing purporting to have been executed by him, and passing title to this land. They rest their defense on the presumption of a conveyance from Dr. Dunn, which they claim arises as a matter of law or fact from the long lapse of time since Dunn's death, the various conveyances which have since been made of the land; the possession of those under whom they claim, and their own possession under said conveyances, together with other facts and circumstances set forth in the record.

The Chancellor held that Dr. Dunn, the ancestor of complainants, although at one time owner of this lot, was not seized and possessed of the same at the date of his death. He held that the entire proof, taken together, justifies the conclusion that Dr. Dunn had sold this lot to Judge William T. Brown, and that said Brown was in the actual possession thereof, under visible inclosures, for several years prior to the death of said Dunn, under circumstances showing that said Dunn knew of the possession and claim of ownership on the part of said Brown; that, while no deed appears of record or is exhibited in the proof of Dunn to Brown, yet the facts and circumstances are of a character to authorize the conclusion that a deed

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might have been made by said Dunn to said Brown, and justifies the presumption of its existence.

The Chancellor further held that this presumption accords with equity and justice, and is in harmony with the conduct of said Dunn and his descendants, by whom no claim to said lot was made from about the year 1845 until the year 1888, when this bill was filed—a period of over forty-three years—during all which time said Brown and those claiming under him were openly exercising acts of ownership over said lot, making improvements thereon, paying taxes, enjoying the use, and appropriating the rents and profits thereof. The Chancellor adjudged, therefore, that complainants had no interest in said land, and dismissed their bill. Complainants appealed, and have assigned errors. The first error assigned is that the Court erred in admitting in evidence the record of the partition suit from the Commercial and Criminal Court of Memphis, purporting to show a partition between the children of Dr. Dudley Dunn of certain portions of the original tract of two hundred and forty-three acres. The ground of the exception is that the complainants in this suit were not parties to the partition suit, and that what transpired or was adjudicated in that suit, is not evidence against those complainants. It is also insisted that the property involved in the present suit was not embraced in the partition suit. The plan attached to the report of the Commissioners

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in the partition suit was particularly objected to by complainants, on the ground that it did not purport to be a conveyance of the property, and could not legally affect the title. The question thus presented for the consideration and determination of the Court is, whether the record of the partition suit was admissible in evidence.

The cardinal inquiry in this suit is whether lot No. 5, which is the property in controversy, was a part of Dr. Dudley Dunn's estate at the date of his death. The object of introducing the record of the partition proceedings was to show that the life tenants under the will of Dr. Dunn did not claim, at the time of the partition, that this lot No. 5, in the Wherry plan, was a part of Dr. Dunn's estate, and that it was intentionally excluded from said partition. It appears from the record that the basis of this partition was a plan made by one John Wherry, a surveyor, some years prior to the partition and during the life-time of Dr. Dunn. The said John Wherry was one of the Commissioners who made this partition, and the allotments were made in accordance with the numbers laid down on the Wherry plan. The Commissioners made no change in the streets and alleys laid out on this plan, but adopted them as they found them on this plan. The evidence in the record indicates very clearly that this plan was made by John Wherry for Dr. Dunn. In May, 1845, Dr. Dunn sold and conveyed lot 18 of said division to James H. Stewart, and in the deed he

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refers to the plan as a survey recently made by John Wherry. In September, 1845, Dr. Dunn sold another lot on said plan to one Price, giving him bond for title, and referring, in express terms, to this plan. It further appears that in January, 1848, Dr. Dunn sold another lot on said plan by the lot number and description given on said plan, *the deed expressly reciting that this plan was made for him.*

Again, in the second codicil to his will, Dr. Dunn refers to this plan, and specifically devises three of the lots on this plan by lot numbers. This plan is exhibited in evidence, and is shown to have been found among the old files of the partition proceedings, in the right place and in proper official custody. As already stated, the Commissioners made this plan the basis of the partition, and they refer to it as the large plan of the division. Now, the most important fact connected with this plan is that it recites on its face that lot No. 5, which is the subject of this controversy, was sold to Judge W. T. Brown. There were three other lots in this plan marked sold, to wit: Lot 18, to Stewart; lot 34, to Price; and lot 33, to Dickinson. All of these four lots were excluded by the Commissioners in making their allotments.

The complainants objected, as already stated, to the introduction in evidence of the record of the partition among the life tenants; also to the plan, which is shown to have been made by John

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Wherry, surveyor for Dr. Dunn; also to the recitals in the deeds from Dr. Dunn to various purchasers of lots in this plan. We are of opinion that this evidence was properly admitted by the Court, as it all tended to show that neither Dr. Dunn, at the date of his death, nor the life tenant devisees under his will, when they came to partition his estate, claimed any right, title, or interest in lot No. 5, which is the subject-matter of this controversy. Says Mr. Wharton, in his work on Evidence, Vol. II., Sec. 1156, viz.: "The self-disserving admissions of a predecessor in title are, as a rule, admissible against those who follow and claim under him, when such admissions are made at the time such predecessor was in possession. Declarations of this character are to be received not only in disparagement and diminution of the property which the declarant enjoyed, but as evidence of any fact which is not foreign to the statement against interest, and which forms substantially a part of it. Thus the declarations of the ancestor that he held the land as the tenant of a third person, are admissible in evidence to show the seizin of that person in an action brought by him against the heir for the land, and declarations of a former owner as to boundaries are, in like manner, admissible. * * * Thus the rule admits, as against succeeding holders of a title, maps, recitals in deeds, monuments and boundaries of which an owner, during his ownership, was author." See also Vol. I., Secs. 194, 668, 670.

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Complainants also objected to the several deeds offered in evidence on the part of defendants, under which they claim title, because those deeds were not connected with Dr. Dudley Dunn, in whom the title to this lot was originally vested, but depend on conveyances made since Dr. Dunn's death. The objection is that the deeds do not show a proper deraignment of title. It is clear, however, that these deeds were admissible in evidence on behalf of defendants, when connected with their respective possessions and the possessions of those under whom they claim, for the purpose of showing the boundaries of such possessions, as well as the nature, extent, and description of their claim. These deeds were also admissible in aid of the presumption of a deed from Dr. Dunn to Judge Brown, arising from long possession of this land by the defendants and those under whom they claim.

Complainants also assign as error the action of the Chancellor in admitting as evidence the deposition of Richard Norris. This witness is an old citizen of Memphis, and testified that Judge Brown was in the actual possession of this lot as early as 1845, which was during the life of Dr. Dunn. He also testified that Brown built a double cabin and sunk a well on this lot in 1845, and that his servants occupied the cabin and used the well. Brown and Norris (the latter testified) built a plank fence on the line between their lots, displacing a rail fence that Brown had previously built on the line of his lot. The evidence of Richard Norris

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was objected to by complainants, on the ground that it is an attempt to prove title to the property in controversy by hearsay and in parol, and upon the further ground that the witness did not state his knowledge or recollection of existing facts, but only what he thought or supposed or concluded must have been facts.

We are of opinion, upon an examination of the deposition, that the objections are not well taken, and the evidence is clearly competent, as showing the possession of Judge Brown by visible inclosures during the life of Dr. Dunn, and the former's acts of dominion and ownership over this property.

It is also insisted on behalf of complainants, that their title as remainder-men vested on the death of their father, William Dudley Dunn, which occurred in May, 1881, and that, as their cause of action accrued at that time, no statute of limitations began to run against them until that date, and that they are not prejudiced or in any way affected by any thing done or omitted during the life of their father, the life tenant. It is true the statutes of limitations do not begin to run against remainder-men until the termination of the life estate. But, as stated by counsel for defendants in his brief, the object of the evidence introduced by defendants is not to set the statutes of limitations or the presumption of a deed in operation against remainder-men during the existence of the particular estate, but to show that there is neither particular estate nor remainder; that in fact the

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will of Dr. Dunn did not embrace this property, because it was not the testator's at his death. If, then, Judge Brown was in possession of this property by visible inclosures in the life-time of Dr. Dunn, and his possession was adverse, as shown by Dr. Dunn's plan, which declares that this lot had been sold to Judge Brown, then there was no particular estate which would defeat the presumption of a deed arising from this long, continuous, and adverse possession of Brown and those claiming under him.

As stated by Justice Fields in *Fletcher v. Fuller*, 120 U. S., 534, the owners of property, especially if it be valuable and available, do not often allow it to remain in the quiet and unquestioned enjoyment of others. Such a course is not in accordance with the ordinary conduct of men. When, therefore, possession and use are long continued, they create a presumption of lawful origin—that is, that they are founded upon such instruments and proceedings as, in law, would pass the right to the possession and use of the property. * * * The general statement of the doctrine, as we have seen from the authorities cited, is that the presumption of a grant is indulged merely to quiet a long possession, which might otherwise be disturbed by reason of the inability of the possessor to produce the muniments of title, which were actually given at the time of the acquisition of the property by him or those under whom he claims, but have been lost, or which he or they were

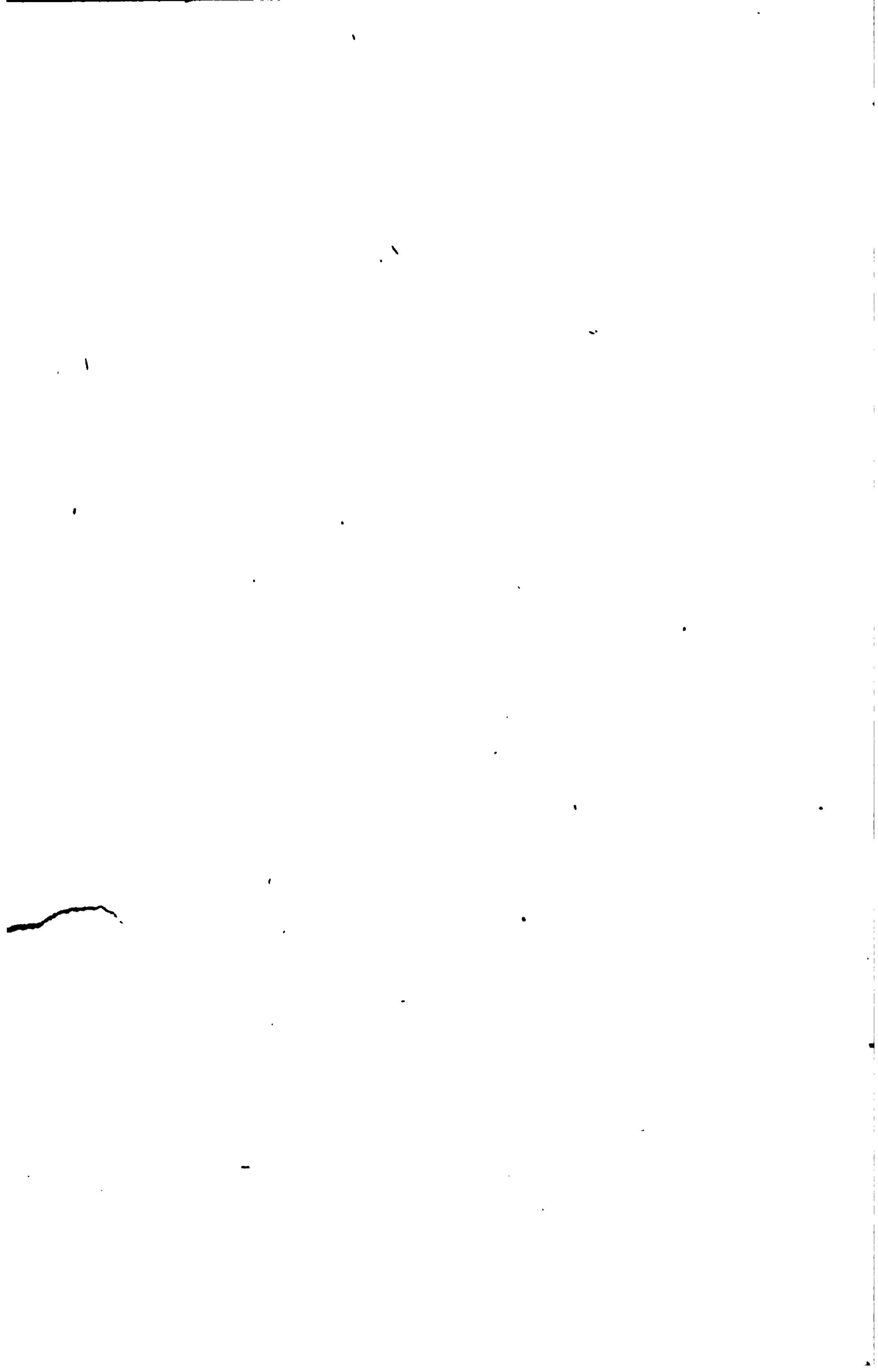
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entitled to have at that time, but had neglected to obtain, and of which the witnesses have passed away, or their recollection of the transaction has become dimmed and imperfect. * * * It is not necessary, therefore, in the cases mentioned, for the jury, in order to presume a conveyance, to believe that a conveyance was in point of fact executed. It is sufficient if the evidence leads to the conclusion that the conveyance *might* have been executed, and that its existence would be a solution of the difficulties arising from its non-execution." To the same effect is *Williams v. Donnell*, 2 Head, 695.

We are of opinion that the presumption of a deed from Dr. Dunn to Judge Brown is well warranted, both as a matter of law and fact upon the evidence presented in this record.

The decree of the Chancellor is affirmed.

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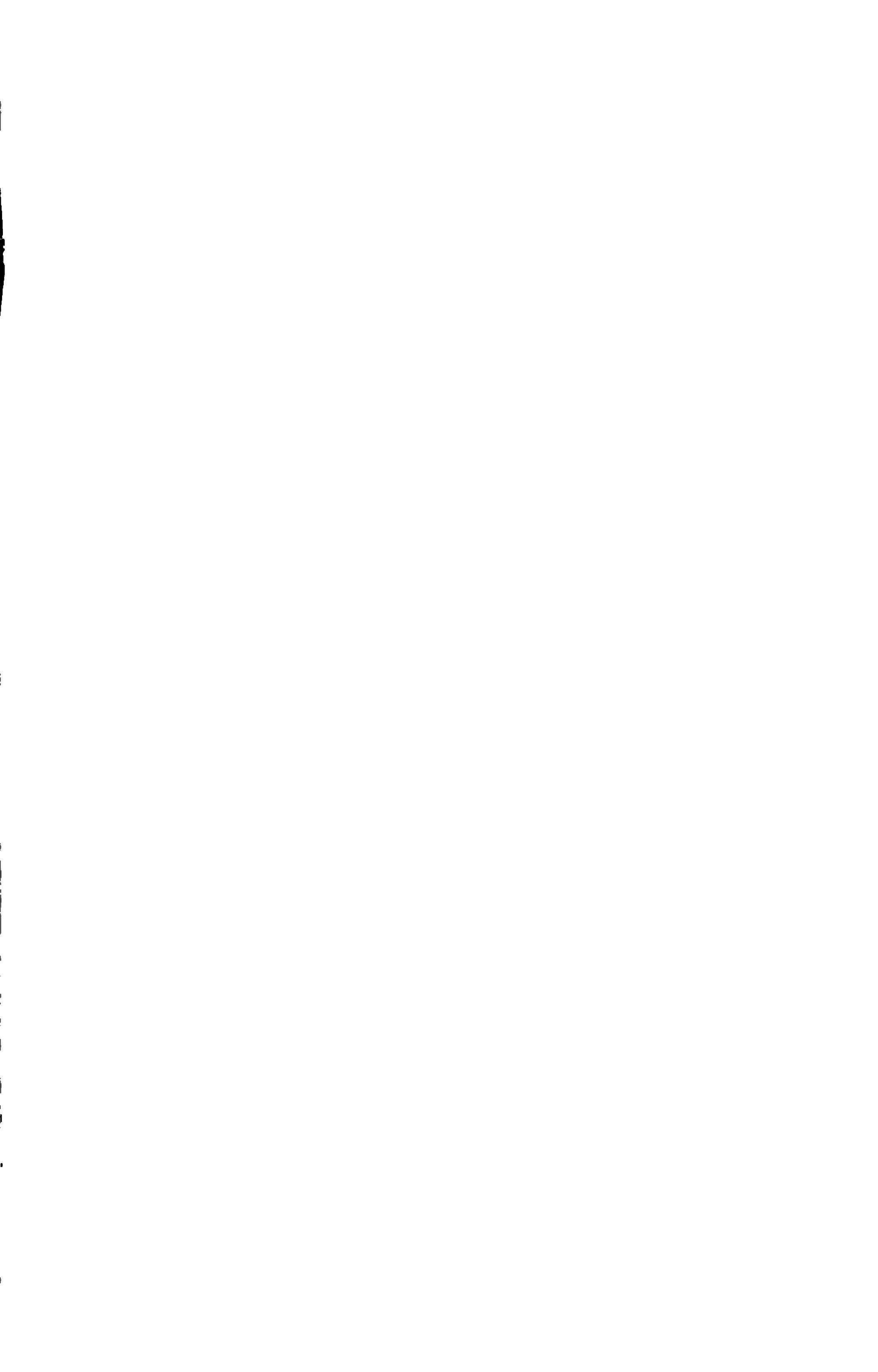
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